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An analysis of Justice Oliver Wendell Holmes's views of the freedom of speech

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AN ANALYSIS OF JUSTICE OLIVER WENDELL HOLMES'S VIEWS ON THE FREEDOM OF SPEECH

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An Abstract of a Thesis

The purpose of this paper has been to investigate the free-speech doctrines of Justice Oliver Wendell Holmes in an effort to see if these doctrines remained consistent during his career on first the Massachusetts Supreme Court and then the United States Supreme Court.

A careful study of the many influences upon the early life of Justice Holmes was first undertaken by this writer. The early writings of Holmes were read in an effort to see any possible trend in his philosophy. Also investigated were his legal essays, his speeches, and his other writings. His judicial opinions and personal correspondence were a major source of information.

During the years Holmes served on the Massachusetts Supreme Court, he was not an outspoken champion of free speech. In the two most important free-speech cases coming before the Massachusetts Supreme Court; Holmes upheld the right of a city to limit the political activity of a policeman, and the validity of a law requiring individuals to get a permit to speak on the Boston Commons.

After joining the United States Supreme Court Holmes continued to uphold restrictions on freedom of speech.

Neither Holmes nor the majority of the Court would accept the use of the "liberty" clause of the Fourteenth Amendment as a protection of free-speech rights from state interference.

The passage of the Espionage Act in 1917 placed stringent restrictions on the right of free speech. Holmes spoke for a unanimous Court in the first three cases upholding the legality of the act as well as upholding convictions resulting from alleged violations of the act. In the third case the evidence was not as strong as in the first two cases. In the fourth free-speech case to come before the Supreme Court, Holmes wrote a stirring dissent saying the lower-court convictions in that case had been unjust. While never questioning the legality of the Espionage Act, Holmes dissented in numerous cases that followed, as he championed the cause of free speech for many years. Holmes's famous "clear and present danger" test was an important free-speech criterion, and he used it in both majority as well as dissenting opinions. A trend was noted in increased protection of freedom of speech on the part of Holmes. An opposite trend was also noted on the part of the Court majority to increasingly restrict freedom of speech. The makeup of the Court had changed by the early 1930's and the free-speech doctrines of Justice Holmes were finally accepted by the majority. The champion of free speech had started a trend toward an increased protection of civil rights that has continued since his time.

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PREFACE

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The author accepts responsibility for any errors.

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CHAPTER I

HOLMES AND THE JUDICIAL PROCESS

An attempt will be made in this chapter to illustrate just what was encompassed in the judicial philosophy of Justice Oliver Wendell Holmes. Several important topics must be discussed in order to complete the objective of the chapter. A brief summary of Holmes's early life will necessarily precede the discussion of several major aspects of the life and philosophy of Justice Holmes.

Oliver Wendell Holmes was born on March 8, 1841, at 8 Montgomery Place, Boston, Massachusetts. His early schooling was at the E. S. Dixwell Latin School, a private school in Boston. (Holmes later married Fanny Dixwell, the daughter of the head of the school, whose aristocratic background was similar to his.) He entered Harvard in 1857 but left to join the Union Army before he could finish. However, he completed his studies and was graduated while in the army in 1861. For three years he served in the Union Army. He became a distinguished soldier in the Twentieth Massachusetts Infantry, rose to the rank of a brevet lieutenant colonel, and finally left the service as a captain. Three times during the Civil War Holmes was wounded, first at Ball's Bluff, next at Antietam, and later at Mayre's Hill near Chancellorsville.

Medicine presented a fine field, but young Holmes wished to be in a different profession than his distinguished father.

Also, the field of business did not seem to be what he wanted. A career as a lawyer had no great appeal to him at this time, but it was to be in law that he was to excel.[1]

A study of law was next undertaken by Holmes, and in 1866 he was graduated from the Harvard Law School. The following year he was admitted to the bar. Holmes lectured on constitutional law and jurisprudence from 1870 to 1872 at Harvard Law School. From 1870 to 1873 he served as editor of the American Law Review and during the same years was busy editing the Twelfth Edition of Kent's Commentaries.

Holmes was extremely fortunate in his youth, for he became acquainted with many of the most important men in New England through his famous father, Oliver Wendell Holmes, Sr. The influence of several great men was profound upon Holmes. Had it not been for the contacts and acquaintances Holmes made, he might never have received the stimulation to seek greater prominence.

A discussion of the most important individuals to influence Holmes will follow next as a major topic. One influence on Holmes was a cousin, Wendell Phillips, an abolitionist leader. Holmes could have remained aloof from the issue of slavery because of his background of Puritan aristocracy and his high social position. The relationship with Wendell Phillips made Holmes aware of the revolt and reform from the past.[2] Holmes was quick to join the army when the Civil War

started, as he believed in the abolition of slavery. Here was a man of wealth recognizing and opposing at an early age the inequalities of the existing system.

While slavery was one area of Holmes's interests, he was also interested in the writings of some of the foremost philosophers of the world. Even while recovering from a wound in the heel he had suffered at Chancellorsville, Holmes read Herbert Spencer's works and also some by John Stuart Mill.[3] Catherine Drinker Bowen pointed out that Mill was one of the strongest influences on young Holmes.[4] When Holmes visited Europe several years later, in 1886, he was able to meet and talk with Mill.[5]

Reading philosophy books occupied a great deal of Holmes's time. At the close of the Civil War the youthful Holmes was undecided as to what his life's work should be. Philosophy appealed to him, as he was troubled by the mysteries of the universe. Acquaintance with Ralph Waldo Emerson and William James was a strong influence in his interest in philosophy.[6] William James and Holmes would often talk for hours about philosophy.[7] As time passed, the friendship continued but was not nearly as intimate.

Writing in 1919 and thinking back about those who had influenced him, Holmes said, "Emerson and Ruskin were the men who set me on fire. Probably a sceptical temperament I

got from my mother had something to do with my way of thinking."[8] Ralph Waldo Emerson was so close a family friend that young Holmes called him "Uncle Waldo."[9] Holmes admired Emerson greatly but had no desire to be the crusader Emerson had been.[10] After he visited and talked with Emerson, Holmes knew he would never be a philosopher.[11] Many years later, in his private correspondence with Harold J. Laski, Holmes confided to Laski that he once believed everything John Ruskin said. But later Holmes's views on Ruskin had completely changed; he felt Ruskin no longer should be held in such a lofty position.[12] Holmes, in his correspondence with Sir Frederick Pollock, mentioned some individuals who had influenced his early life. Writing in 1930, he admitted that several people had become less important to him. Both John Ruskin and Thomas Carlyle had lost stature in his eyes, and the only one to stir him as he had when he had been younger was Emerson.[13]

While the writings of several philosophers were of interest, it appears that Holmes did not fully accept the writings of Kant, Spencer, or Mill. These philosophers believed very strongly in the safeguarding of individual freedoms with an absolute minimum of governmental interference. Their extreme views on freedom were not accepted by Holmes.[14]

An important legal influence was George Otis Shattuck, a man with whom Holmes was associated as a law partner for several years. Holmes learned much during the period he

was associated with Shattuck. Of special importance was the sense of brevity which Holmes gained from his senior partner. Holmes's ability to say a great deal in very few words will be discussed as a major topic later in this chapter. While there were other individuals who influenced Holmes, Shattuck will be the last one discussed here.

The next section of this chapter will deal with some of the legal doctrines of Justice Holmes. The legal doctrines that Holmes formed were a combination of many things. Several areas of his judicial work will be discussed topically in the pages that follow. Each of the areas to be discussed was of great importance and contributed to his over-all judicial philosophy.

The first of these areas to be discussed concerns Holmes's viewpoints on the role of judges. Holmes believed society should be very cautious about overruling any existing precedent. When social conflicts arise and an inability to decide a certain case by logic exists, the judge must be permitted to make what he feels is the best choice.[15] A warning was sounded by Holmes, however, against letting personal views cloud the administration of justice. The purpose of courts is not to form public opinion; rather, the purpose is to enforce law once it has been created by public opinion.[16]

Writing in 1926 from Washington to his friend Harold J. Laski, Holmes mentioned the role of judges. Holmes felt that

many people have the mistaken impression that what is stated by judges comes from some infinite authoritative source. Judges, however, are merely spokesmen for the group from which they receive their power. Therefore they are speaking for the people. Laws are based on the past and not upon the wish of a judge who may have utter disregard for law.[17]

The place and importance of judges in society was discussed by Holmes. He did not believe the courts were so important that society could not exist without courts. Holmes pointed this out as he said:

> I have no belief in panaceas and almost none in sudden ruin....I am not much interested one way or the other in the nostrums now so strenuously urged. I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do not think the Union would be imperiled if we could not make that declaration as to the laws of the several States.[18]

The next major area of discussion is Justice Holmes and his political affiliations. Politics or public affairs in general held little interest for Justice Holmes; law occupied his time. In 1870 when James Bryce and Albert Venn Dicey came to Harvard, they were both amazed that Holmes cared so little for politics. This was especially surprising because here was a man who had risked his life for the Union and had been wounded three times in the process. Harold J. Laski also pointed out that Holmes had no political connections because no party moved him to any degree.[19]

Party affiliation to Holmes was simply a case of belonging to the Republican party in Massachusetts. No political ties existed between him and anyone who could influence his opinions. No particular group or type of people could claim him as an ally solely to their group.[20] Senator Henry Cabot Lodge tried to get Holmes to seek the governorship of Massachusetts. Lodge believed this would eventually lead to a seat in the United States Senate. Holmes showed his dislike for politics when he replied to Lodge, "But I don't give a damn about being Senator."[21]

Biographer Catherine Drinker Bowen noted that Holmes's fellow judge, Louis Brandeis, believed that Holmes's lifelong policy of remaining aloof and remote from government and politics greatly increased the ability of Justice Holmes to interpret the Constitution.[22] Perhaps a few final words will sufficiently cover Holmes and politics. As far as he possibly could, Holmes refused interviews while on the Supreme Court. He would speak publicly only to members of his own profession. During this same time he refused to take part in any public affairs not related to the Court.[23]

The next major topic will be a discussion of Justice Holmes's speed and brevity in deciding cases and writing opinions. One trademark of any opinion by Holmes was his use of as few words as possible. Likewise, when hearing a case he wanted to hear only the facts. One trait which

aided Holmes in achieving brevity was the use of negative words frequently. The quotation cited in footnote eighteen is a fine example of his use of negative words.

Limited time, Holmes believed, eliminated the necessity for looking into all the side issues of a case. Time must be considered in law and in seeking the main idea; side issues must be by-passed.[24] Holmes saw no need to spend time reading all the related cases. He felt this would be foolish because a grasp of the major principles is adequate. A large number of side issues would not serve any good purpose.[25] Holmes kept a record of all the motions that were made and also took notes on the oral arguments in each case. By doing this he made his supply of information so complete that he had little difficulty in deciding cases and preparing opinions.

There were those who complained that Holmes's opinions were too short, but he believed a brief opinion was often more effective than a lengthy one.[26] Opinions that would require pages for other justices to write could be written by Holmes in a few paragraphs. Only the main facts should be relied upon, was the contention of Holmes, and there was frequently no need whatsoever to go into the history of all that was past.[27] Holmes felt that the length of time spent in reaching a decision was of no importance. Those believing a case must be deliberated over for an extended period of

time to make sure the case is given better consideration are wrong, according to Holmes. Getting down to work and working hard quite likely will produce just as fine a result as a long, drawn-out deliberation.[28]

Some people were amazed by Holmes's ability to have his opinions ready on Monday morning for distribution after having been assigned the opinions on Friday afternoon. There was no lack of effort in his doing it in so short a time; rather, it was knowledge of American law which permitted him to do his work so fast.[29] Holmes could write an opinion in two or three days; his colleagues would need from two weeks to six months. He had the ability to sum up a case while the lawyers were still arguing, an ability which caused many to complain that he was not giving adequate consideration to the cases coming before the Court.[30] Holmes frequently would listen intently to a complex argument, stop suddenly, and begin to read the briefs. Then he would signal the court pages to bring him reports which had been used by the counsel. Before the counsel had finished, he was often ready to begin to write his opinion.[31] Writing to his long-time friend, Harold J. Laski, Holmes mentioned the fact that there were those who thought he did not do a thorough enough job because of his speed.[32]

When speaking of the methods of his former partner, George Otis Shattuck, Holmes pointed out Shattuck's greatest

assets were tact and swiftness. Holmes declared that he felt much cross-examination proved to be both a waste of time and harmful to the lawyer's case.[33]

Early in Holmes's career he said he did not need a secretary. The manner in which Holmes wrote a decision was the basis for his declaring he had no need for a secretary. Holmes stated that when he was ready to write a decision, he would "...get into a spasm over it, and by the time I am ready to talk I have written it."[34] Holmes, however, soon found a need for a secretary and used him. Nevertheless, he would invariably check the secretary's verifications of the citations used in a case.

The brevity associated with Holmes's work was illustrated in an article appearing in the New York Times following the death of Holmes. A particularly long-winded lawyer was arguing before the Supreme Court and requested an additional thirty minutes in which to complete his arguments. A quiet conference between Chief Justice Taft and the other members of the bench was held. When Holmes was asked if he felt the request should be granted, he answered in a not-too-subdued voice, "I'd see him in hell first." The Chief Justice denied the request of the lawyer.[35]

The next major area of discussion will relate to the use of history in law. Naturally much of judicial activity

concerns that which is past. Therefore, some mention will be made of the use Holmes made of history in deciding questions of law. The role of precedents, the historical development of law, and the possible over-use of history will be examined.

Reference was also made by Holmes to the value of precedents in an article written in the American Law Review in 1873. While some lawyers tried to lower the value of precedents, Holmes sought to stress their importance as one of the most important aspects of our legal system.[36]

Writing in The Common Law, Holmes said a great need existed to know the past in law in order to know the present. He cautioned against the use of precedents because they come from the past, in some cases the far distant past. A need existed to reconsider issues and decide if they suited the needs of the present law or if they did not. Any examination and possible revision of the law must be carefully undertaken.[37] Precedents should be overruled in law only when they no longer conform to the needs of the day. Human behavior has not varied greatly from year to year; therefore, it is desirable that the standards existing at the time be known by everyone.[38]

In deciding a case a judge should first look to existing laws to see if any law covers the particular type of case to be decided. If no specific law exists, the next step is

to check custom and decide what custom prevails. Then using all possible investigation the case is to be decided along the lines of custom. Quite naturally the first step in deciding any case would be to conduct a preliminary investigation.[39]

Writing in The Common Law, Holmes depicted the development of law in the following manner. First there are two greatly different cases suggesting a general distinction. With such a situation it is easy to see the difference between the two. As new cases arise, however, they join either one of the two distinctions. However, as more cases arise, the difference gradually becomes smaller. Finally, there are cases which come so close to the line that the distinction becomes almost impossible to see. Nevertheless, a line must be drawn, and in time it becomes so arbitrary that it could have been drawn just as easily on the other side than the side decided upon.[40]

History is useful in deciding cases, but care must be taken as changes have occurred and are continuing to do so. Just because our fathers did something is no reason for us to do it.[41] History has a place in law because a knowledge of the rules is quite necessary. Present rules cannot be carefully considered without a knowledge of the past. The rules must fit the needs of the day.[42] A legal system is a combination of present needs and desires, and rules handed

down from the past.[43]

With the publication of The Common Law Holmes's views on various aspects of the law become clear. Perhaps it was shocking to those reading his opening lines regarding the history of law. Holmes said:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than syllogism in determining the rules by which men should be governed....[44]

Continuing, Holmes stated that the law is not merely a series of mathematical formulas. To understand law fully, one must understand what has occurred as well as what is occurring. Such an understanding requires a knowledge of present legislation and of past history.[45] The opening statement by Holmes repudiated the traditional understanding of the judicial process, according to one biographer, Mark DeWolfe Howe.[46] Holmes was the first lawyer, either English or American, to take the common law and put it under philosophical analysis to gain historical explanation.[47]

While history serves very well in deciding cases, there may be certain fallacies if decisions are based only on history. To rely on the past can become a mistake, declared Holmes, if the past becomes the sole source of decision. He believed "...that continuity with the past is only a necessity

and not a duty."[48] The past merely serves to provide a point from which to start to decide the case.

Tradition frequently plays too great a role in a judicial decision, and the historical role is overdone.[49] The only value of the past is the light it reflects on the present, and this should become increasingly less with the passage of time.[50]

Another major legal topic which concerned Holmes was the codification of law. In an article in the American Law Review Holmes suggested that a code of law should be written. If all the material pertaining to a particular subject would be brought together and made easily accessible, the task of judges and lawyers would be much easier and much more accurately performed. The work of several experts could result in a greatly simplified code of law. A series of decisions could be used as a basis and a general rule established. A knowledge of the general rules and of related cases could greatly aid the judicial system.[51]

The question of codifying the law was of great importance in Holmes's early thinking. Evidence of this is the fact that Holmes's edited the twelfth edition of Kent's Commentaries in an attempt to bring that work up to date. (The edition of Kent's Commentaries edited by Holmes was published in 1873). In the first sentence in the preface to Volume I, Holmes stated that he had spent three years in

his efforts to bring the work up to date.[52] He had gone so far as to rewrite his own work in view of cases that had arisen after he had begun his task. Holmes was careful to point out that he was merely editing the volumes and not rewriting them.[53]

Certainly a major aspect of law is determining where the line is drawn in deciding cases. The arguments for and the arguments against a defendant must be carefully considered. All aspects of a case must be weighed. Holmes had this to say:

> Eminent judges have been puzzled where to draw the line....But the principle is believed to be similar to that on which all other lines are drawn by the law. Public policy, that is to say, legislative considerations are at the bottom of the matter; the considerations being, in this case, the nearness of the danger, the greatness of the harm, and the degree of apprehension felt.[54]

Community standards may be used as a basis to decide cases. The conduct of all is expected to be that of the average of the standard of conduct maintained by the community. The line, Holmes believed, is determined by considering how great the threat of danger or the likelihood of harm resulting from the act is in any action. The determinant to be used is experience.[55]

There exist diversified cases, Holmes felt, which can easily be judged. Gradually new cases arise which come closer and closer to the line separating the two poles of right and

wrong. The line must be drawn closer and closer, and in some cases the line could easily be drawn in either direction.[56] Drawing the line between law and custom presented a problem for Holmes because of a natural confusion between the two. Established norms are not the same as the existing social behavior. There is often a conflict in modern society between usage and custom. Rules passed down are important and should be recognized, however, such rules may be changed.[57]

By 1895, Holmes postulated that the ideal system of law would rely more on science and less on sentiment or tradition. The fact that we have never done something differently cannot necessitate our doing it the same way now or accepting that way as the final truth.[58]

Several things can be noted in the formative years of the life of Oliver Wendell Holmes. His aristocratic background could have made him complacent, but this was not to be. Harvard University and the Civil War gave him both a strong physical and intellectual bearing. His study of law was marked by the thoroughness of a true legal scholar. A great reserve of knowledge had been built by Holmes, and this, combined with the quality of independent judicial observation, made him a well-qualified judicial authority.

CHAPTER II

MASSACHUSETTS CASES

When the opportunity to join the Massachusetts Supreme Court was presented to Holmes, he was quick to respond and accept the position. Serving in this capacity, Holmes believed he could really see what should exist in the field of law and justice.[1] A career as a courtroom lawyer did not seem to be exactly to Holmes's liking, and he sought a more conspicuous post. His search for prominence was partially fulfilled by his ascendence in 1882 to a full professorship at Harvard University. Evidently this was not the position Holmes really wanted, because he quickly accepted the position of a judge on the state supreme court when it was offered to him by Governor John David Long.[2] The fine reputation Holmes had made in constitutional law was a leading factor in the selection of Holmes to the post.

The publication in 1881 of The Common Law, written by Holmes, no doubt had a great deal to do with his appointment to the Massachusetts Supreme Court. Recognized as authoritative and adopted as a part of juristic thought, Holmes's book was to be of great importance not only in the life of Oliver Wendell Holmes but also in American law. When he accepted at Harvard, it was understood he would be able to resign from the post if he were offered a position on the

high court of that state. A judgeship did become available to him in a few months. Holmes was appointed to the Supreme Court of Massachusetts in 1882 and became Chief Justice on August 2, 1899. Charles Jackson, the grandfather of Justice Holmes, had served as an associate justice on the same court a number of years earlier. Holmes's long stay on the Massachusetts Supreme Court was terminated with his acceptance of an appointment to an associate justiceship on the Supreme Court of the United States in 1902. His career on the high court was to prove even more lengthy than that on the Massachusetts court.

Justice Holmes differed from the other judges of his day as they generally had either been politicians or successful lawyers, whose clientele included railroads, utilities, or corporations, prior to joining the state's high court. The problem of ending a life of politics or success in law to take on the objectivity required of a judge is obviously an extremely difficult one. Therefore, Holmes possessed a distinct advantage over most appointees as he had not experienced any great political success, nor did he carry with him to the state court the reputation of being a great lawyer.[3] While he had been an associate in a law firm, he did not gain any great degree of fame in the field. Perhaps all of the previously stated reasons had much to do with Holmes's tendency to vote in the affirmative in questions regarding the protec-

tion of individual rights in cases involving constitutional law.

It appears Holmes received a great many, perhaps more than his share, of the opinions to be written while a member of the Massachusetts Supreme Court. The reason for this is not difficult to find. It was simply the extreme speed with which Holmes could record an opinion. There was no evidence, at this early stage or at any other stage in his career as a judge, that this obvious speed in any way detracted from his thoroughness in analyzing a case.[4] Once again it is clear that his experiences previous to his appointment as a Massachusetts Supreme Court judge were to become an invaluable aid on the bench in Massachusetts as well as later on the bench of the United States Supreme Court.

Writing in Yankee from Olympus, Catherine Drinker Bowen stated the method Holmes employed at this time in deciding a case. Basically he would listen to the oral argument and decide from that rather than from the brief. As the lawyer started the argument, Holmes would lean forward and take notes. After a period of time, very possibly only five minutes, he would lean back and close his eyes. When he did this the others would say that he had made up his mind.[5]

Some of the views of Justice Holmes on matters relative to free speech were stated by him in The Common Law, written previous to his appointment to the Massachusetts bench.

One of the areas Holmes had covered in his book was slander. Certain things in law, such as a lawyer presenting his argument, are privileged. The real question in deciding a case, believed Holmes, was whether the damage was intended or not. Even then two things have to be considered. One of these is the importance given to free speaking. The other aspect is the degree of damage inflicted by the written or spoken word. If it is intended to cause damage, it would not be a valid reason for stating the words. Several elements are necessary to result in slander. There must be a speaker, a hearer, and a person about whom the remarks are intended. The statements must be false, but there is some question as to whether the speaker need know if they are false.[6]

An early Massachusetts case in which Holmes gave an opinion relative to freedom of expression was a libel case, Cowley v. Pulsifer. The action was brought against the owners and publishers of the Boston Herald. After stating some of the aspects of the case in his opinion, Holmes mentioned the fact that in cases of this nature the most important thing is that the facts be made public. The reason for this is not only because the public should know but also so the proper method of justice may be carried out.[7]

Another libel case, Burt v. Advertiser, involved the publishing of an article which a newspaper had good reason to believe to be true. This case serves as an example of what

Holmes considered valid criticism of public officers. Holmes felt it proper for the state court to deny the paper the right to publish statements made without regard to individual rights.[8]

When writing with regard to malice and intent in law in The Common Law, Holmes gave the criteria on which to judge such cases. The statements must be proved to have been known to be false by the defendant or to have been greatly in excess of what was required under the circumstances. It is beneficial that the public to informed, but it should not be told lies. If statements are known to be false by the defendant, he enjoys no privilege to make such statements. Such statements are made at the peril of the party making them.[9]

One of the two most important free-speech opinions given by Holmes while on the Massachusetts Supreme Court followed in an 1892 case, McAuliffe v. New Bedford. The case arose out of the dismissal of a policeman for violation of regulations concerning political activity of policemen. A violation of one of the rules in the city's police regulations was cited as the cause of dismissal. The violated rule concerned, in part, the political activity of policemen and prohibited them from soliciting money for any purpose of a political nature. Commenting on the validity of the action and the statute in question, Justice Holmes expressed the opinion that so long as the mayor wasn't the final judge of sufficiency of cause, and the right to appeal to the state court exists, the action

was perfectly legal. Continuing his opinion, Holmes said that nothing in the Constitution or in the statutes of the city need keep the city from setting certain standards or requirements. Proper conduct most certainly may be required of an official such as a policeman. Holmes had this to say:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech....

So long as the requirements for working are reasonable and understood, there was no doubt about the validity of the mayor's action. There was a question of the adequacy of the hearing, but admission of guilt by the dismissed McAuliffe and his failure to present any protest when first informed were further evidences of violation.[10] The decision of the state court given by Holmes, therefore, was in favor of the city of New Bedford and against McAuliffe.

The importance of the McAuliffe case is easily seen. The fact that the city could control what its employees said is evidence of Holmes's belief that restraint could be exerted by the state in the area of free speech. This fact should be kept in mind because Holmes never questioned the right of the government to make laws restricting freedom of speech. Even when he spoke in dissent in later free speech cases, it was a matter of guilt or innocence of those accused of violating the existing laws that was to be decided and not the validity

of the law being tested.

Holmes's decision in McAuliffe v. New Bedford was cited in more recent times when the loyalty of government employees was questioned. A board operating in 1947 was headed by Seth W. Richardson and used the formula upon which Holmes based his decision in the 1892 case. The Richardson Board urged that a chance be given for appeal but said such a request did not have to be granted by the federal government.[11]

A dissent by Holmes in 1893 formed the basis for the majority decision he delivered for the United States Supreme Court several years later in Peck v. Tribune Co., a case that will be discussed in the next chapter. A libel case developed when a newspaper confused H. P. Hanson with one Andrew H. P. Hanson, both of whom lived in South Boston and were real estate and insurance brokers. Stated in the paper was the fact that H. P. Hanson was a prisoner in the criminal dock and had been fined.[12] The paper, published by the Globe Newspaper Company, contended that the statements were not intended to be applied to the plaintiff and therefore were not just cause for a libel suit. The question Holmes had to decide was whether the fact that a mistake had occurred, or the fact that alleged harm resulted to H. P. Hanson was to be the determining factor. Here we find Holmes drawing the fine line of justice and also giving some determinants. In the first

place, the ignorance of the reporter in making a mistake was not a valid excuse because there was nothing to show the reporter meant anyone but the plaintiff H. P. Hanson. Since few people are aware of who is before the court, the public is not expected to make a check of the criminal records and see exactly who is being charged in the case. Had the names been precisely the same, there probably would have been no case, but such was not true here. Two judges, Justice Morton and Justice Barker, concurred with the dissent by Holmes.[13]

Two cases are usually considered to be the extent of any real expression by Holmes on free speech while on the bench in Massachusetts. One of these was the case of Mc-Auliffe v. New Bedford (previously discussed), and the other was Commonwealth v. Davis. The reasons for the inclusion of the libel cases has been to show a possible trend in Holmes's decisions as a state justice.

It was very apparent to Holmes that limits must be placed on freedom of individuals. This he considered to be an important part of the political power of a nation. Held valid in Commonwealth v. Davis was a city ordinance that prohibited anyone from speaking publicly on the Boston Commons without first getting a permit from the mayor.[14] This case in 1895 was before many instances in which mayors have used their right to issue or refuse to issue a permit to speak on the town or city commons.[15] An ordinance restricting people from

speaking on the Boston Commons without a permit resulted in the arrest, trial, and conviction of Davis, the defendant in the case. The defendant had contended that the ordinance as stated was unconstitutional in structure. Holmes delivered the majority decision, and in an appeal by Davis to the United States Supreme Court that body upheld the decision of the state court.

The constitutionality of the law was verified immediately by Holmes in his opinion, and he left no doubt regarding that point. The ordinance in question was directed specifically at ways in which the Boston Commons may be used and not at freedom of speech specifically. Since the Commons was a public place, the city could regulate its uses just as it could extend control over streets and other public places. Holmes compared control by the government to private control and said:

> For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.[16]

Continuing, Holmes said that the city could regulate the use of the Commons except as limited by statute. As far as the limitation of usage, there seemed to be no indication that there was anything wrong or unfair with the limitation set by the ordinance in question.[17] The decision rendered by

Justice Holmes, and upheld by the United States Supreme Court two years later, may possibly have been reached because he did not want to step brazenly into the arena of free speech.

When leaving the bench in Massachusetts to join the United States Supreme Court, Holmes looked back and viewed law as a battle between tradition and the changing wishes and needs of the people. It was viewed as the will of the present against the pressure of the past. Social as well as economic considerations were important. Holmes was able to see that to find a certainty in law was impossible and the only method was to use any available guides to settle the issues.[18]

To this point there seems to be no strong indication that Holmes would later be the dissenting free speech spokesman in cases starting during World War I. Whether Holmes's majority opinion in McAuliffe v. New Bedford would have been similar or different in 1920 can merely be guessed. It is the opinion of the writer of this paper that the fact that it was a case involving a civil servant would probably have caused him to have followed the same course if the same case had appeared in 1920. Holmes felt there were certain limits on positions in government such as his own in 1920, and therefore would quite likely have followed the same reasoning. On the other hand, Holmes may have reasoned more along the lines of an injustice being imposed upon an individual, in this instance McAuliffe, as the protection of the individual

would be paramount. This seems doubtful, however.

In the Davis case a slightly different situation existed. Despite the upholding of the Davis case in 1897 by the Supreme Court, there remains a question of what Holmes would have done at a later date, such as 1920. Since Davis was not a civil servant, as was McAuliffe, it might well be that a different stand would have been taken by Justice Holmes. The distribution of leaflets in the World War I Abrams case, which Holmes felt were useless and harmless, could serve as a guide for speculation on the opinion of Holmes in the David case had it arisen in 1920.

One thing was certain at this time. Holmes was very cautious about any free speech utterances, as were the majority of justices and judges of his day on both the state and the national level. There was no indication when Holmes left the Massachusetts Supreme Court that he would be a strong spokesman for free speech.

CHAPTER III

PRE-WORLD WAR I FREE SPEECH CASES

A brief study of Justice Holmes's free speech decisions during the pre-World War I period will be given here in order to provide some insight into the free speech attitude entertained by Justice Holmes at this time in his judicial career.

Justice Holmes's first occasion to speak for the Supreme Court in an issue involving freedom of speech arose with the case of Patterson v. Colorado. In this case early in Holmes's career as United States Supreme Court Justice, he spoke for the majority and gave no indication this was to be the voice of dissent in later free-speech cases. The circumstances involving this case as contrasted with those of the later cases were so greatly varied that it is perhaps unfair to consider it along with the later ones. Nevertheless, to get an overall perspective the observer must consider all the cases of this nature. To be constantly remembered, however, are the great changes the passing of time had brought to the American scene between the first free-speech utterances of Holmes and his never-to-be-forgotten expressions of freedom in cases arising from the World War I enforcement of the Espionage Act. Having joined the Court several years earlier, Holmes had a fine judicial background. It most certainly was a well-informed judge who wrote the majority

decision. A vital factor to be considered, also, is the fact that this case was decided on April 15, 1907, well after Holmes had joined the highest judicial body in the United States. The Patterson case was especially important because the issue of contempt, the jurisdiction of federal courts, and freedom of speech were all involved.

Thomas M. Patterson, a man who was formerly a senator from Colorado, had been fined one thousand dollars for contempt. In a published statement in Patterson's Denver paper, the legality of the appointment of two judges was questioned. Patterson based his case on the guarantees contained in the First and Fourteenth Amendments. He claimed the two judges had obtained their seats in a plan directed at putting Republican candidates into office. Patterson was insistent that he was telling the truth and that it was his constitutional right to prove his attack on the state courts was true. A significant aspect of the case is the fact that the charges made by Patterson had been made while election fraud cases were before the courts of that state.[1]

Perhaps it should be pointed out what had happened in the past when cases of this nature reached the Supreme Court. Zechariah Chafee Jr. pointed out that in cases of this nature where a newspaper was held in contempt of court, the possibilities were very remote of an appeal being sustained,

regardless of the extent to which the liberty of the press was restricted.[2] The established precedent was for state courts, up to and including state supreme courts, to deny any appeals made by newspapers.

The Patterson case had come to the United States Supreme Court, where it had been sent from the highest court of Colorado for want of jurisdiction. The contempt issue arose because the articles and the cartoon were published while the case was pending before the state supreme court in Colorado. Their being published at this particular time would interfere with the requirement that the procedure of justice be impartial as well as unhindered in its administration. In addition to the articles published by Patterson, there appeared a cartoon supporting the charges contained in the articles.[3] Statements in the articles contended that the court of the state was involved in the plan to have Republicans rather than the elected Democrats seated in various offices. The office of governor was also allegedly involved.[4]

Early in his written opinion of the case, Holmes made a reference to the Fourteenth Amendment and the due process clause. Holmes referred also to the legality of a petition for a rehearing if the case is still pending before the local courts. To this question Holmes set aside the issue by

calling it a question for state law to settle without the Constitution of the United States interfering. Another important question present was that of possible federal interference, Holmes again relied on state law and stated that a state may punish contempt at any time there exists a possibility of a modification of judgment through appeal.[5] The question of contempt arose out of the statements contained in the newspaper articles. It was not a question of the articles necessarily being right or wrong in the facts stated; rather, it was the time element that was considered paramount. Since the articles, whether true or false, had been published while the case had been on trial, the majority decision stated that they very definitely constituted a contempt of court.[6] The Supreme Court at this time was not prepared to upset the established precedent and reverse the state decision.

Contentions that the judgment in the case failed to follow precedent were brought out by Holmes in the written opinion. Continuing, Holmes said the general rule was naturally to follow precedent, but there existed exceptions from this practice, no matter how strong the existing customs.[7] It may be noted that writing more than twenty years previous to the Patterson decision in his book <u>The Common Law</u>, Holmes discussed the value of precedent. Even at that time he felt that issues of law should be subject to close scrutiny and progress may easily be made by continuing to question the

reasons for established precedents.[8]

Holmes at this time used as a basis for free speech decisions the theory that freedom of speech or press is restricted to freedom from previous restraint. With this conception Holmes was following the Blackstone view on freedom of the press.[9] The Court was not going to decide on the issue, Holmes said, whether there existed the same restriction in the Fourteenth Amendment that existed in the First Amendment. Justice Holmes did comment, however, on free speech, saying that even if there was a protection from restriction on free speech and free press, the findings of the judges would still be quite different from the opinion sought by the plaintiff. Thus he was saying quite frankly that the plaintiff's arguments were very weak.[10] While other governments have sought and utilized previous restraint of publications, Justice Holmes stated that we have not followed this practice, so what a publisher wishes to say may be said. This does not exempt them from punishment. If the publication is decided by the courts to be a distinct danger to public welfare, there exists no doubt that the publisher may be punished. To substantiate this Holmes cited the earlier case of Commonwealth v. Blanding. With the previous-restraint protection the right to print material exists without regard to the truth of the information. However, the prosecuting power may determine what is false and hold the writer libel for what

is said. This procedure was followed in criminal libel cases, and Holmes stated that the application was even more clear in contempt cases. Where there existed the possibility of the publication reaching the jury or the judge or judges, the chance of outside influence is naturally strong, and justice very definitely may be hindered.[11]

Upon completion of a case the courts may be subject to criticism, but not before such time, continued Holmes. The objection that the judges were sitting in their own case was discarded by him because the basis punishing contempts is impersonal. Holmes closed the majority opinion by stating that the case had been observed carefully and the writ of error had been denied.[12]

In one dissenting opinion Justice Brewer said that he felt the claim by Patterson was a valid one and the study of it should be undertaken by the Court. Since the Court had agreed not to decide on the question of the Fourteenth Amendment, Justice Brewer said there was no point in voicing his expressions on the case.[13]

In dissent also, Justice Harlan went further than his associates and emphasized his belief that freedom of speech and of the press are protected by both the "liberty" and the "due process" clauses of the Fourteenth Amendment. While the Supreme Court majority refused to decide whether the First

Amendment protection is included in the Fourteenth Amendment, Justice Harlan viewed the refusal of the Court as a direct violation of the Constitution.

During the 1920's the "liberty" protected by the "due process" clause of the Fourteenth Amendment was accepted by the United States Supreme Court majority. Thus evidenced was the fulfillment of the stand Holmes and the majority of the Supreme Court had refused to accept in the 1907 case involving Patterson. The specific case where the Court upheld the Fourteenth Amendment in this light will be discussed in Chapter V in the adjudication in the famous Gitlow case.

Why would the champion of free speech after World War I refuse to use the Fourteenth Amendment in 1907 as a protection for free speech? Some possible answers may be set forth. To begin, it was very doubtful if the personnel of the Court would have supported such a position at this time. Harlan's dissent makes it evident there was only one member of the judicial body prepared to accept the term "liberty" from the due process clause of the Fourteenth Amendment as a protection of free speech. Another reason was Holmes's constant refusal to interfere with the rights of individual states if it was not an absolute necessity. Finally, the merits of the case seemed to take away any doubt as to what the decision of the

highest law body would be.

It was several years before Justice Holmes gave another opinion relative to free speech. Speaking for a unanimous judicial body, Holmes again expressed some ideas on freedom of speech. The circumstances involved in this case differ greatly from those of most cases. Significant in regard to the investigation with which this paper is concerned is the fact that this case came before the Supreme Court in January 1915 and was decided on February 23, 1915, almost a full twelve years after the Patterson case.

The Fox v. Washington case involved a 1909 statute in Washington which made it criminal for anyone to circulate writings that urged a breach of the peace or any disrespect in any way for the law.[14] Several nature lovers had attempted to set up a Utopian type society, but they found that the laws of the state extended to them also. They ran into difficulty with the law when they expressed their opinions and dissatisfaction in print. While there seemed to be no law against their type of society, the law was violated by what was contained in their public opinions. These writings were considered by the Court as opinions that would encourage either a disrespect for the law or encourage the commission of a crime.[15]

Earlier the Supreme Court of the state of Washington had dismissed the contentions that the statute was unconsti-

tutional. Here once again was a question of state versus national power, and the Fourteenth Amendment was mentioned by Holmes. In Holmes's opinion freedom of speech is guaranteed by the United States Constitution, and there was every indication that the lower court relied on the Constitution, including the Fourteenth Amendment, to reach its decision. The state of Washington's highest tribunal certified through the chief justice of that state that both the United States Constitution and the Fourteenth Amendment were the basis for the decision of that judicial body.[16]

The State of Washington claimed that the United States Constitution was not being violated by the state statute which made it a criminal act to print material that would advocate either a disrespect for the law or discourage obeying the law. The plaintiff's case was based on two points. One point was a deprivation of liberty and property, and the other was that the state statute was in direct violation of the Fourteenth Amendment.

Passages from the article in question, "The Nudes and the Prudes," were quoted by Holmes in his opinion. Included were remarks concerning the suppression of freedom. Society in general was also criticized. The arrest of four individuals for indecent exposure and the subsequent imprisonment of two of their number resulted in a charge that they had been denied

the right of liberty. Continuing, the articles claimed the action was a step toward subjection of the community to the persecution of the outside world. While not directly stating it, Holmes nevertheless implied that the article was such as to strongly suggest a violation of the law.[17] It was charged by those in opposition to the plaintiff that the article encouraged a violation of the statute making indecent exposure unlawful. Had the intent been to produce unfavorable opinion without open advocacy there may have been no such decision; but disrespect and disregard for the law were advocated, and this was an open violation. Therefore, the Supreme Court upheld the statute in question, and it also upheld the legality of the decision of the highest court in the state of Washington.

Once again the free-speech issue, as well as the involvement of the Fourteenth Amendment, was basically brushed aside by directing the attention in the case to the state statute.[18] While not raising the First Amendment against a state law, Holmes apparently accepted the legality of the action. The case was clearly one of an overt act contrary to the law and a publication advising that an act or violation be committed.[19] Since Holmes spoke for a unanimous group, there seems to be no doubt as to the wisdom of justice in this case.

While attempting to interpret Justice Holmes's free-speech attitude in pre-World War I cases, other examples

must be found to give a better insight into his outlook than merely using the Fox and Patterson cases. Since just two cases have been discussed, and since Holmes expressed himself in no other free-speech cases before World War I, it is necessary to look at several diversified cases to do this. The chronological approach will be employed.

Difficulties in deciding cases were pointed out by Holmes in his opinion in Swift and Company v. United States, a case involving monopolies. Holmes cautioned against reaching a seemingly obvious opinion. All merits of the case must be considered. Even though unlawful objectives are sought, if they are not achieved, the result is not necessarily unlawful. A dividing line must be very carefully drawn and conclusions carefully reached. Holmes pointed out that there was a difference between the preliminary plans for a crime and an attempt to commit crime.[20] It is difficult to determine to just what extent preparations and attempts to carry out a crime constitute a crime. Does an attempt at murder begin with pulling the trigger, or does it begin earlier with the purchase of the pistol? Does it possibly begin with the thought of murder? Also, does it matter how close the victim is to the weapon? All these are questions that must be answered.

Another case relative to the right of free speech was Twining and Cornell v. New Jersey. Justice Holmes concurred in the majority opinion given by Justice Moody. In question

was the failure of the accused to testify. This failure to testify quite naturally should be considered in a discussion of freedom of speech. The contention of the accused in the trial in the lower tribunal was that the judge's comments were in direct violation of the Fourteenth Amendment and due process of law. The state court had decided that the Fourteenth Amendment's enforcement was a state responsibility and was not necessarily uniform throughout the states. Questioned in the case was the legality of a New Jersey law permitting the judge to comment on an accused person's failure to testify on his own behalf. This the lower court judge--in very strong words--had done. When Justice Moody delivered the majority opinion, he cited the Slaughter House Cases and said the Fourteenth Amendment had not taken the civil rights away from the states.[21] He continued that the only requirement for conviction was that the accused be given adequate notice of accusation and an opportunity be given for him to defend himself.[22]

Justice Harlan, again dissenting, claimed a violation of free speech in the case. He said the Fourteenth Amendment guaranteed individuals the protection of rights (such as freedom of speech) from any state infringement.[23] Once again the majority of the United States Supreme Court, including Justice Holmes, did not decide on federal protection of

"liberty" under the Fourteenth Amendment. Since Holmes did not write a separate opinion and did not dissent, we can only surmise that his views must have been along the lines of the majority decision.

Considered next in interpreting Justice Holmes's free speech sentiments is a lawsuit involving the issue of libel. Holmes may be observed rendering the majority decision for the high court in litigation arising from an advertisement in the Chicago Sunday Tribune. In the ad in question Mrs. A. Schuman was pictured praising the curative powers of Duffy's Pure Malt Whiskey as a good tonic to be used by patients suffering from a generally rundown condition. The name and address of the plaintiff were also given in the publication. When hearing the case, the lower court judge excluded from the testimony three of the plaintiff's arguments. She claimed she was not the woman pictured, nor was she a nurse. She also claimed to be a total abstainer. Pleading not guilty, the newspaper succeeded in having her testimony excluded, and the circuit court of appeals sustained the action of the lower court judge. Holmes and the Court reversed the decision and found the ad was libelous and the publisher, therefore, had taken a risk in publishing it. The question arose: should the case of libel be decided in her favor despite the fact that (1) no actual damage resulted, (2) drinking whiskey is not wrong, and (3) being a nurse is not a disresputable

occupation? Holmes said there was no existing precedent to direct the disposition of the case and the question that remained was simply did the publication do her harm or not. In reversing the lower court's judgment he pointed out the difficulties that would arise from unauthorized use of facts, and what distorted facts could be presented if there were no way to limit any such misuse of facts.[24] While Holmes spoke for the majority in this libel case, the same was not true in a very similar libel case in Massachusetts in 1893, when Holmes wrote in dissent in the Hanson v. Globe Newspaper Company case (discussed previously in this paper). Thus the passing of a decade and a half saw Holmes's Massachusetts dissent become the law of the nation.[25]

A question of deprivation of the right of liberty and of property arose in Patsone v. Pennsylvania, decided in 1914. Involved in the case was a state law prohibiting aliens from killing wild game and also prohibiting them from possessing a shotgun or rifle.[26] Holmes said in his majority opinion that the possession of a pistol is adequate for self-defense, so there is no need for an alien to possess a shotgun or rifle. Regarding the question of discrimination against a group, Holmes remarked that if there exists the likelihood that a certain group will be the cause of trouble, the state may act to prevent trouble before it occurs. While such state

action may not be fair to everyone, Holmes felt it insufficient cause to invalidate the challenged Pennsylvania statute. He continued that since the state knows much better where local trouble is likely to arise, the Supreme Court should be very slow to invalidate any state law. This is especially true in this case, he said, because nothing was brought to the Supreme Court proving the local court verdict was wrong.

A remaining issue concerned a treaty with Italy of February 26, 1871, assuring protection of persons and property. Holmes finished his opinion by pointing out that the treaty had said nothing about wild fowl or wild game.[27]

A final case to be considered in the pre-World War I period was Toledo Newspaper Company v. United States. Holmes felt the lower court judge in this case had used his power to prosecute a newspaper illegally. The contention of the defendant was that newspaper statements which had a tendency to influence the judge, the jury, or in any way hinder the administration of justice and were made before or during a trial violated legislation passed by Congress on March 2, 1831.[28]

A company operating the railroads of Toledo faced the expiration of its franchise on March 27, 1914. However, difficulties arose in renewing the contract. An ordinance providing for a three-cent fare on a day-to-day basis, pending

negotiation, was passed and put in effect on March 27. Speaking out for the city against the company was the Toledo News-Bee, which stated that the city had every right to pass the ordinance. The transit company sought an injunction, which was refused in a March 30 decision but was granted in September. Speaking at a labor union meeting, a man referred to in Holmes's decision simply by his last name, Quinlivan, criticized the court and was given an attachment of contempt. On September 15 the News-Bee was given the same penalty as the labor leader for its comments on his activities.[29] Justice White sustained the lower court's decision on the basis of the tendency of the paper's actions to obstruct justice.[30]

In his dissenting opinion Holmes pointed out that attacks were carried on for six months before the judge acted. This would show that no emergency existed and that justice was not obstructed. To be considered, too, was the fact that the accuser was also the judge in the case and personal feelings could easily have influenced the judge.[31] The basic ideas in Holmes's dissent became the law starting in a series of cases beginning in 1941.[32]

In summary, Justice Holmes's free-speech opinions before World War I seem consistent with those of the majority. One important exception was the News-Bee case in which Holmes dissented and Justice Brandeis concurred. Perhaps this was

to be a preview of the stand Holmes took in his opinions for freedom of speech. The decisions given by Holmes are important. In Patterson v. Colorado the highest court brushed aside the relevance of the "liberty" clause of the Fourteenth Amendment and left this for the individual state to decide. In Twining and Cornell v. New Jersey the Court again refused to rule on the exact function of the Fourteenth Amendment. Finally in the Fox case the opportunity again arose for the Court to invoke the "liberty" clause of the Fourteenth Amendment, but the Court did not take a stand, thereby giving the issue back to the states.

CHAPTER IV

HOLMES AS THE VOICE OF THE MAJORITY

The coming of World War I and the subsequent involvement of the United States presented a judicial picture without a parallel in the history of the American nation. The diversity of cultural backgrounds of the citizens of the United States made unanimity of action utterly impossible. Suddenly thousands of newly arrived immigrants to our shores found themselves as enemies of the land of their birth. As in any approaching conflict, or actual conflict, emotions ran high, and many people were gripped by the wild hysteria that tends to shatter all laws of reason.

It will be the early World War I free-speech cases of significance that will be investigated here to provide a look at Holmes's judicial outlook and, especially, to present his views on the first really important free-speech cases in United States history.

The investigation of free speech in the United States should logically begin by noting that the Fifth Congress of the United States on July 14, 1798, passed a law frequently referred to as the Sedition Act. The actual title was "An Act for the Punishment of Certain Crimes Against the United States." Punishable by this statute was anyone conspiring against the federal government to hinder the course of law

or to intimidate or prevent any federal official from the execution of his duties. A fine of five thousand dollars or less and a prison term of six months to five years were provided in the act.[1]

Freedom of speech and the press were specifically limited by Section 2 of the Sedition Act, which provided fines up to two thousand dollars and up to two years imprisonment upon conviction. Prohibited by the act were writings or verbal expressions defaming the country, the President, or the Congress.[2] The act passed in 1798 was brought about because of the impending war with France.[3]

While the number of arrests made under the Sedition Act is not certain, there were at least twenty-five, with fifteen resulting in indictments and ten resulting in convictions. In most of the cases the action was directed against a Republican with a trial conducted by a Federalist judge.[4] With the expiration of the time limit of the law in 1801 it died, President Jefferson pardoned those convicted, and Congress in time paid back all of the fines that had been imposed.[5] Particularly of note is the fact that the Sedition Act of 1798 was never tested in a case before the Supreme Court of the United States.[6]

The next time when similar action occurred was during the Civil War. President Lincoln felt suppression of free speech was necessary, and he did not appear to question the

constitutionality of his action. The case of Clement Vallandigham is perhaps the best example of a Civil War case in which an individual was arrested, tried, and convicted.[7] Critical of the war measures of the Union, Vallandigham was arrested and convicted by court-martial. Branded a traitor, he was banished to the South. Lincoln, however, did not believe that all criticism should be suppressed; he failed to comply with a military request that the New York World and the Chicago Times be suppressed.[8]

It is ironical that the United States could have existed for almost one hundred and fifty years without a case arising that would serve as a guide in free-speech cases. Prior to 1917 few, if any, decisions that were satisfactory examples had been reached concerning the free-speech clauses of the Constitution. Cases involving libel, slander, or indecency had been decided on the merits of the individual case.[9]

At this point it should be pointed out that the opposition to the act of 1798 was so widespread that no similar legislation was passed during either of the two later and very critical periods of our history, the War of 1812 and the Civil War.[10]

While Europe was in a turmoil in 1917, the danger facing the United States steadily increased and Congress on June 15, 1917, gave its approval to the act commonly called the Espionage Act. Included in the act were references to espionage,

neutrality, and general interference with the war effort.[11] Authorization for the action taken was expressedly granted by Article I, Section I, of the United States Constitution granting Congress the power to make laws.

Perhaps it should be noted that the declaration of war was made on April 6, 1917, four days after President Wilson's historic address to Congress stating that the nation had no other course than to declare war. It was slightly over two months later when the Espionage Act followed with its June 15, 1917, passage. The act was passed by Congress to curb the rising opposition to any involvement by the United States in the war. Several amendments to the original act were made to the Espionage Act on May 18, 1918. These are referred to as the Sedition Act.

In Section 3 of Title I of the Espionage Act provisions were included concerning any cases coming before the highest court relevant to the act. One of these provisions related to transmission of statements or reports that would in any way interfere with the war effort of the United States. Another provision pertained to attempts to hinder the military effort by causing mutiny or insubordination among those serving in the armed forces or causing a failure to serve among any persons not serving. A third provision related to the actual obstruction of either recruiting or enlisting in any branch of the armed forces of the United States.

Offenders were subject to fines ranging up to not more than ten thousand dollars, or a twenty-year prison term, or both.[12]

Title XII, Section 2, related to the use of the postal service and classified any letters, newspapers, and circulars which would tend to urge treason or any resistance to federal law to be of a nonmailable character.[13] In Section 3 under the same title the possible sentence provided was up to five years in prison, a fine not to exceed five thousand dollars, or both of these.[14]

The Sedition Act of 1918 called for the insertion of the words "attempt to obstruct" in the third of the original provisions which related to enlistment or recruiting. A total of twelve offenses were punishable as nine new ones were added.[15] One new offense was of particular importance as far as opinions rendered by Holmes were concerned. The provision violated, in a case where Holmes gave an opinion, was related to writings that were in opposition to the government. Each new offense carried a fine of ten thousand dollars, or a twenty-year prison term, or both.[16]

It is somewhat ironical that the first case testing a conviction under the Espionage Act did not reach the United States Supreme Court until after the armistice had been declared. (On the other hand, the relatively short period during which the United States was declaredly involved in the war made it highly improbable that a case could have come

before the Court before an armistice.) The first case of note to come before the high court was argued on January 9 and 10, 1919, and was decided on March 3, 1919. This was the case of Schenck v. United States, and it was the first of three in which Holmes delivered the majority decision. The majority opinion given by Holmes in Schenck v. United States is no doubt the best known on the issue of freedom of speech.

While there appears to be no specific reason why Holmes was assigned to write the opinion in Schenck v. United States, Holmes's Civil War background makes it logical he should feel the necessity of some restraint on the freedom of speech in the time of war.[17] Holmes's keen ability to look at a case and decide it with great, if not complete, objectivity makes it logical, too, that he should give the first decision for the high court regarding free speech and the Espionage Act. Also, the judge's long and respected career may have been a reason he was called on for a just decision. The tendency of the Court in the past to remain aloof from issues of free speech was now to be changed since the Espionage Act was a federal law and the national effort as well as the national welfare were now directly concerned. Because this was the first Espionage Act case, a great deal rested on the decision.

Why was Holmes assigned the first Espionage Act opinions?

In a letter dated April 5, 1919, Holmes wrote to Sir Frederick Pollock and stated why he believed the early Espionage Act cases had been assigned to him: the fact that he would go further than his fellow judges in the direction of free speech.[18] This would partially compensate for the fanatical decisions reached by some lower court judges.

The Schenck case proved to be a milestone in American judicial history. Holmes's opinion was one of the most, if not the most, famous of his long and greatly respected judicial career. The case came before the Supreme Court from a district court in Pennsylvania. Counsel for Schenck argued that sincerity of purpose and honesty of belief were the true tests of free speech and that the Espionage Act violated freedom of speech and the press. Another of their contentions was that the indictment charged the defendant only, and one person, they claimed, could not constitute a conspiracy. They claimed that another defendant, Elizabeth aer, had nothing more than mere knowledge of the conspiracy, and therefore she could not be convicted. Still another point, counsel for Schenck claimed, was that papers held as evidence were seized under a search warrant and could not be lawfully used as evidence.

The government's arguments were that the First Amendment was not violated by Section 3 of Title I of the Espionage Act, one conspirator's declaration may be used against

another, adequate evidence existed, and the use of evidence seized by a search warrant was not in violation of either the Fourth or Fifth Amendments to the Constitution.[19]

Holmes's opinion for the Court began with a discussion of the three-count indictment. The first count charged conspiracy to violate the 1917 Espionage Act and its amendments the following year. The second count charged conspiracy to use the mails in a manner declared by the Espionage Act to be illegal. Finally, the third count charged that the defendant had used the mails for the purpose of conspiracy in violation of Section 3 of Title XII.[20]

Defense for Schenck based its stand on the First Amendment, which forbids the enactment of laws hindering freedom of either speech or the press.[21] Schenck's lawyers also claimed an insufficiency of evidence in proving that Schenck had sent the leaflets in question. To this Holmes gave the following facts: (1) Schenck was a general secretary of the Socialist party; (2) Schenck was in charge of the headquarters from which the documents were sent; (3) a book was identified by Schenck as containing executive committee minutes, which showed a resolution of August 13, 1917, calling for the printing of fifteen thousand leaflets on the reverse side of a leaflet in use, and these in turn were to be mailed to drafted men who had not yet reported for service; (4) the printing had been taken care of personally by

Schenck; (5) the report of Schenck, the general secretary, showed the leaflets were back from the printer and addressing them had begun; (6) a resolution had set aside $125.00 to be used in mailing the leaflets; (7) copies of the leaflets were found in the office files; (8) proof existed that copies had been sent to drafted men; (9) little doubt existed that Schenck was primarily responsible for sending the circulars in question; and (10) Baer was a member of the committee, and the minutes were hers.[22]

Holmes stated that adequate evidence existed, and, continuing in his opinion, Holmes broke down the arguments presented by Schenck. Schenck's claim of an inadmissibility of evidence gained through a search warrant was not valid, Holmes said, because numerous cases had upheld the use of evidence gained under a search warrant. Holmes pointed out that the search warrant was issued against the Socialist headquarters at 1326 Arch Street, Philadelphia, and not against Schenck.[23]

The leaflets sent by Schenck contained claims that the Conscription Act violated the Thirteenth Amendment. A conscript, the leaflets said, was very similar to a convict. The writers of the circulars compared conscription to despotism, and they claimed our entrance into the war was in the interest of Wall Street. It was further stated in the leaflets that it was the constitutional right of citizens to oppose the draft. The leaflets also contained criticism of the

sending of soldiers to foreign land. While Holmes did admit that the leaflets urged peaceful means, he concluded that the leaflets would never have been sent if resistance had not been desired by those sending the leaflets.

The plaintiff, Schenck, did not deny the fact that if no effect had been desired the pamphlets would not have been sent. Thus it was admitted that the aim was to encourage people to oppose the draft and the war effort in general. An entirely different aspect to the case would have existed if the statements had merely expressed an opinion. Instead the statements sought opposition to the war effort.

Of special importance in the Schenck case was the "clear and present danger" test formulated by Holmes. This test originated by Holmes, was to have great influence, both at that time and in later free-speech cases. Perhaps no test had as great an impact on free speech during World War I and its aftermath as the test implied by the phrase "clear and present danger."

In his classic opinion Holmes said:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends on the circumstances in which it was done....The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic....The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that

> Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterances will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced...[24]

Failure on the part of Schenck to obstruct physically the draft, implied Holmes in his opinion, did not mean his action was not a violation of the law.[25] As far as the amendments of 1918 were concerned, there was no need to involve them, said Holmes in closing.[26]

It seems very doubtful that Holmes wanted to create any specific test that would be used in all cases regarding freedom of speech. This is true of the test implied in the mere words "clear and present danger," which were taken from context afterward by many people seeking a criterion on which to base a decision. Another part of Holmes's Schenck decision less frequently referred to is the term "substantive evils." This term has from time to time been quoted in reference to free-speech cases.

Another important aspect of this, as well as other free speech cases, was the question of previous restraint. Already discussed in this paper was the disposition of the Patterson case and its relevance to previous restraint. While one writer, Samuel Konefsky, pointed out protection

against previous restraint was abandoned in the Schenck case,[27] it should be noted that a state of war existed, so it seems reasonable that the previous-restraint protection was removed in the best interests of the nation. On the other hand, those in sharp opposition to our entrance into the war, quite naturally, would voice criticism of the curtailment of any previously enjoyed freedom.

Commendation was one reaction to Holmes's decision. Ernest Bates called the decision the Supreme Court's "high-water mark of liberalism."[28] Reacting oppositely, Edwin Newman, felt there was no evidence that the relatively few leaflets mailed by Schenck created any danger to the security of the nation.[29] Max Lerner wrote that he believed Holmes did not consider the right of free speech an absolute right. The circumstances, Lerner wrote, were what Holmes used as a guide.[30]

Of all the words or terms in the Schenck case, very possibly the most important were these words of Holmes's: "When a nation is at war...." These words may really have controlled the disposition of the case, though they are frequently lost amid the references made to better known phrases in Holmes's opinion.

The second test of the Espionage Act before the Supreme Court of the United States followed within a week of the Schenck judgment. The Schenck case was argued on January 9

and 10, 1919, and was decided on March 3, 1919.[31] Exactly a week after that decision, on March 10, 1919, a second decision was delivered in Frohwerk v. United States, a case argued January 27, 1919.[32] This case came from the United States District Court for the Western District of Missouri. In this case, as in the Schenck case, a conviction for conspiracy to obstruct recruiting or enlistment was upheld by the United States Supreme Court.[33]

Counsel for Frohwerk argued that Congress had no power over speech, press, or opinions because these were expressedly guaranteed by the Constitution. A further contention was that the regulation of speech and press was a police power, and had been delegated to the individual states. With freedom of speech therefore guaranteed, Frohwerk's counsel maintained, each man had the right to express his opinions.

The counsel for the United States argued that the rights of free speech and free press were not absolute rights to write, publish, or utter whatever one pleased. The defense cited existing views and the fact that freedom of the press extended to previous restraint with the writer enjoying no guarantee of protection following publication. It was further contended by the United States that constitutional immunity did not extend to attempts to interfere with military efforts. Attempts to get others to violate the law by either direct or indirect language were outside the limits of our constitution.[34]

The Supreme Court's decision in the Frohwerk case was given by Justice Holmes. In citing the facts of the case, Holmes pointed out that the indictment included thirteen counts such as conspiracy to violate the Espionage Act, efforts to promote disloyalty or mutiny, refusal to serve, and several lesser charges. The first count related to the plaintiff and Carl Gleeser, the two of whom were publishing a newspaper, the Missouri Staats Zeitung. Frohwerk and Gleeser were charged with conspiring to violate the Espionage Act of 1917. Also included in the first count was reference to twelve articles or statements appearing in the Missouri Staats Zeitung between July 6, 1917, and December 7, 1917.[35] The lower court had found Frohwerk guilty, fined him, and given him a ten-year sentence.[36]

In his opinion Holmes referred to the Schenck decision. Citing the similarity between the two cases, Holmes felt the only thing needed to be added to the first decision was the fact that the First Amendment very clearly did not, and was not designed to, extend to whatever men may say. This Holmes emphasized as he said:

> We venture to believe that neither Hamilton nor Madison, nor any other competent person than or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech....[37]

Holmes continued that the articles in Frohwerk's paper were critical of the sending of our soldiers to France, of

the administration, and of our war effort in general. Stressed by the articles were the benefits the financial interests in America and England would derive as a result of the war. Also, the draft was attacked by the articles that defended the German actions.[38] The question arose concerning just when may attacks be made on the government. Holmes gave an idea regarding when and to what degree such attacks may be made. His thoughts were evident when he said:

> It may be that all this might be said or written even in time of war in circumstances that would not make it a crime. We do not lose our right to condemn either measure or men because the country is at war. It does not appear that there was any special effort to reach men who were subject to the draft, and if the evidence should show that the defendant was a poor man, turning out copy for Gleeser, his employer, at less than a day laborer's pay, for Gleeser to use or reject, as he saw fit, in a newspaper of small circulation, there would be a natural inclination to test every question of law to be found in the record very thoroughly before upholding the severe penalty imposed.[39]

He continued Frohwerk's paper was distributed in an area where such utterances could have produced very serious results. The lower court's judgment was upheld by the Supreme Court in this the second case testing the Espionage Act of 1917.[40]

It is interesting to note that in the Frohwerk case Holmes did not use per se the "clear and present danger" test he had formulated earlier in the Schenck decision.[41] It is also interesting to note that the Court did not rule

directly on the constitutionality of the Espionage Act, but by not ruling it did in effect substantiate the validity of the Espionage Act in regard to enlistment as well as freedom of speech.[42]

Writing in his book Free Speech in the United States, Zechariah Chafee Jr. claimed that no special effort had been made in the Frohwerk case to reach those men drafted. The articles, the same author felt, tended to advocate a governmental policy change rather than opposition to the draft. Pointed out also was the fact that a weak defense counsel was a prime reason Frohwerk's case was a losing one.[43] Adequate evidence for conviction existed, but a better defense counsel might have changed the complexion of the case.

The third and final of the early World War I free-speech cases, in which Holmes spoke for the majority, was the case of Debs v. United States. The decision in this case was delivered on the same day as the Frohwerk judgment. In some respects this was the most important of the three early World War I decisions rendered by Holmes. Eugene V. Debs was nationally known, and this fact alone drew great attention to the case. Debs headed the American Socialist Party and had run unsuccessfully four times for the presidency. Unquestionably, he was the most famous person to be imprisoned under the Espionage Act. Another reason why the case was of particular significance was the fact that the material in

question was not a printed letter as in the Schenck case, nor a series of articles as in the Frohwerk case, but instead a speech delivered by Debs.

The case came from the District Court of the United States for the Northern Division of Ohio, where the court had convicted Debs for obstructing military service. Primary arguments for Debs were based on several points. Among these arguments were the alleged failure of the indictment to charge a specific crime, the inadmissibility as evidence of the National Socialist Party's St. Louis Platform, and inadmissibility of court-recorded criminal proceedings as evidence. Still another argument was a claim that the military and naval clauses of the Espionage Act applied only to those in the service. Debs also claimed the protection of the First Amendment against the charges made.[44]

The federal government's arguments against Debs were numerous. Among them were the adequacy of the indictment, the admissibility of the St. Louis platform as evidence, the lack of prejudice of any sort against the defendant, the existence of recognized exceptions to the guarantee of free speech, the absence of protection against incitement to violate law, and the failure of freedom of speech rights to extend to obstruction of the military.[45]

The New York Times related that Debs, speaking in his own behalf, alleged that he was convicted for a mere state

of mind and not for his actions. Also noted in that newspaper was Debs's charge that the right of free speech was violated by the Espionage Act.[46]

The opinion of the Court was delivered once again by Holmes. This marked the third time in as many cases that Justice Holmes spoke for the Court. In the facts and findings of the case Holmes and the Court limited the case to two counts. One of these related to such things as insubordination and disloyalty. The other count related to obstruction of enlistment or recruiting.[47] Holmes stated that Debs had delivered a speech on June 16, 1918, at Canton, Ohio, and the charges stemmed from that speech. Tried and convicted, Debs faced a ten-year imprisonment. Socialism had been the theme of Debs's speech, but Holmes did not enter into a discussion of the merits of that system. Instead, he concentrated on the main issue: obstruction of the governmental recruiting program. He also said that protection of the right of free speech cannot be assured in all instances. Holmes did not use the "clear and present danger" phraseology which he had used before; rather, he used different words. Holmes stated that immunity cannot be guaranteed to the speaker "if a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service...."[48]

The speech in question began with Debs's alluding to a

visit he had made to a jail where three persons had been committed for helping another person to avoid registering for the draft. Continuing, Debs mentioned that he had better not say all that he could, which Holmes said was an indication that Debs would have said more if he thought he were permitted. Debs praised those convicted and voiced disapproval of militarism in such a manner that he was critical of the United States. Debs praised also the socialistic beliefs of one Kate Richards O'Hare, who had been convicted of enlistment obstruction. Rose Pastor Stokes's conviction for similar reasons was also cited by Debs.[49]

During his trial Debs spoke in his own behalf and admitted obstructing the war effort because he hated war. Holmes mentioned Debs's statements but said Debs's comments at the trial had no bearing because "the opposition was so expressed that its natural and intended effect would be to obstruct recruiting."[50] Using the words just quoted as a guide, Holmes did not refer to the "clear and present danger" test he used in the Schenck decision.

Holmes mentioned the fact that Debs had supported the St. Louis platform of the Socialist Party in his speech in Canton, Ohio. A part of the platform was an anti-war statement, which Debs backed in the speech in Canton. Holmes said of Debs's speech and conviction:

> ....If in that speech he used words tending to obstruct the recruiting service, he meant that they should have that effect....We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonable probable effect to obstruct the recruiting service, etc., and unless the defendant had the specific intent to do so in mind.[51]

The lower-court decision on obstruction, said Holmes in his opinion, was sustained. He continued that the conviction was based on obstruction and there was no need to investigate the insubordination charge. There seemed to be no reason to review the verdict on this count, concluded Holmes.[52]

It was thought by many that the failure of the Court to declare the Espionage Act either constitutional or unconstitutional was an indication that the Supreme Court intended to determine each case on its own merits. Since the Court did not declare the Act unconstitutional, it did not, in the Court's opinion, interfere with the basic rights of free speech.

While the Debs litigation was before the Court, several other Espionage Act cases were pending before that tribunal, and approximately seventy-five such cases were in appellate courts throughout the nation.[53]

As in any controversial issue the majority decision of the Court, delivered by Holmes, has been the subject of much criticism. One writer claimed that there was no proof of any stimulus by Debs to obstruct recruiting or to cause any disloyalty in the army.[54] Another writer called Debs one

of the best loved Americans of his day and said Debs had been sentenced for obstruction of enlistment even though he did not mention the word "enlistment." This same writer claimed Debs had been convicted for a "constructive" crime, that is, a crime tending to create a crime. The same writer also cited this interpretation as being one that has been rejected in modern times.[55] A writer in the New Republic said no obstruction whatever existed in the case, and that Congress had rendered free-speech rights useless. The New Republic writer stated that in France or Germany what a person may or may not do was specified by law, but American law (specifically the Espionage Act) was so vague that a person had no way of knowing right or wrong.[56]

Max Lerner called the Debs decision the most highly criticized of Holmes's civil-liberty opinions.[57] Writing just after the Debs decision, Holmes confided to Harold J. Laski that he would rather not write decisions in cases involving extreme radicals. Holmes further wrote that it was foolish to consider people like Debs dangerous. However, he said he must follow the law on questions of law. Holmes told Laski that many judges in the lower courts pushed the law to an extreme. In the same letter Holmes said he felt that the President would pardon many of those convicted.[58] In his writings to Sir Frederick Pollock, Holmes said essentially the same thing that he had said to Harold J. Laski. Just as

he had written to Laski, Holmes expressed a wish that the President would pardon those convicted. People such as Debs were not considered dangerous by Holmes; he referred to such people as "poor devils."[59] Frohwerk's sentence was commuted by Wilson after one year, and Debs's sentence was commuted after two years.

The Debs decision must have caused Holmes a great deal of thought. He mentioned the decision and reaction in several letters to his two English friends. Writing to Harold J. Laski from Washington, D. C., on April 20, 1919, Holmes again mentioned Debs and questioned the wisdom of Debs. While not stating publicly his opinion of Debs, Holmes in his personal correspondence questioned if Debs really had any ideas. People such as Debs, Holmes felt, do not really know what they want. Continuing in his letter, Holmes quoted these words from the Bible: "Father forgive them; for they know not what they do!"[60]

Writing to Harold J. Laski from Washington, D. C., on May 1, 1919, Holmes stated that he believed his decision in the Debs case was the reason he was one person sought out by the leaders in a plot to send bombs through the mail to be received on the same day by various important United States citizens. He questioned the intelligence of the people who had sent the bombs.[61] A few weeks before the bomb incident Holmes wrote to Sir Frederick Pollock that he was getting,

what he termed, "stupid letters of protest" in response to the decision in the Debs case.[62]

The New York Times said the bomb conspiracy seemed to be national in scope. Some of the most prominent men in the United States were intended victims. In addition to Holmes were Postmaster General A. S. Burleson, Attorney General A. Mitchell Palmer, Judge Kenesaw Mountain Landis, Mayor John F. Hyland, John D. Rockefeller, J. P. Morgan, Mayor Ole Hanson of Seattle, and a score of other important figures. The plot seemed to have Industrial Workers of the World and Bolshevik origins. Fortunately, post office clerk Charles Caplan had read of an attempt on the life of former Senator Thomas W. Harwick of Georgia. The postal clerk then informed police of some suspicious looking packages, and prompt police action averted any tragedy. Judge Landis was an intended victim because he had presided over a Chicago trial in which over one hundred Industrial Workers of the World members, including national leader William D. Haywood, were convicted. Holmes's decisions in the early Espionage Act cases may have been the reason his life was threatened.[63] It was unusually odd, Holmes felt, that he should be one of those scheduled to receive a bomb because he took what he termed "an extremist view in favor of free speech." Many lower court judges, on the other hand, seemed unreasonable in their prosecution during the war.[64]

The Debs case was the final Espionage Act case in which Holmes spoke for the majority. There were many who felt their champion of liberty, Justice Holmes, had disappointed them by the three decisions of March 1919. Those critical of Holmes were disappointed because he was not the outspoken champion of free speech they had expected him to be. But perhaps he was waiting until a case came before the Court that would be so completely a violation of the right of free speech that he could then voice a really strong argument against a conviction. Holmes had written the unanimous decision in the Schenck case and had the unanimous backing of the "clear and present danger" test. Therefore, he had formulated the test, and any failure to agree with Holmes in later cases would be an indication that the rest of the Court was not following the test accepted earlier by the Court in the first Espionage Act cases.[65]

CHAPTER V

HOLMES DISSENTING

Some of the most important dissents in United States Supreme Court history were written by Justice Holmes in the later World War I Espionage Act cases, which will be considered along with Holmes's opinions in related civil-liberty cases. Classic in style as in judgment, these dissents pointed the way to the future, a day when the Court would uphold to an even greater degree the rights of individual citizens. As Holmes turned from the majority to dissent, many who had been disappointed by Holmes's early World War I decisions now gained a new admiration for Holmes. Questions naturally arise. Did Holmes suddenly shift from the majority, or did the majority shift from Holmes? Or was the shift much less obvious than it appeared on the surface? An effort will be made to answer these questions.

The closing days of World War I and the early months of peace were marked with an influx of ideas from Moscow which struck fear and panic into the hearts and minds of many of our citizens. This threat to the democratic system was marked by a lack of tolerance by both those supporting and those opposing such ideas. While Holmes believed individuals should be free to think as they wish, he was unable to convince the rest of the Court.[1]

Holmes often had a fellow judge with him in dissent. As a result the names Brandeis and Holmes became synonymous with dissent. Perhaps an anecdote, related after the death of Holmes in 1935, will present a picture of the dissents by Holmes and Brandeis. The New York Times related an incident that gave an idea of the apparent frequency with which Holmes and Brandeis were known to dissent. A play entitled Of Thee I Sing had contained a scene in which the Supreme Court made an announcement that the nation's First Lady has given birth to a son. At this point one character in the play supposedly was to chant: "Brandeis and Holmes dissent." While the line was not included in the final version of the play, Holmes heard of it, laughed heartily at the line, and expressed a wish that the line had been retained.[2] There was to be little humor for Holmes in the area of free speech, however.

After the end of World War I there was a shift in concern regarding freedom of speech from the national to the state level. In the individual states many laws were enacted to curtail radical propaganda. When a state case came before the Court, Holmes considered whether there existed any great threat to the state or nation before he attempted to decide the case. Any statements made had to present a distinct threat to the nation's security before Holmes would rule against the person making such statements. To him it was a matter of deciding each case on its own merits.[3]

The first of Holmes's free-speech dissents arising directly from the Espionage Act was Abrams v. United States. This case was argued October 21 and 22, 1919, and a verdict was delivered on November 12, 1919, a full eight months after the Frohwerk and Debs decisions. This lawsuit had come to the high court from a district court in New York. Arguments for Abrams ranged from a stand that the First Amendment makes the Espionage Act invalid to an argument that criticism of governmental policies was not new nor necessarily a crime. On the other hand, the federal government cited the validity of the Espionage Act and its amendments, stated that freedom of the press is not violated by the First Amendment, and said that sufficient evidence existed for conviction.[4]

A four-count indictment charged the defendants sought to violate the Espionage Act by the distribution of unlawful leaflets. Justice Clarke delivered the majority opinion and gave several of the facts of the case. He said that all five defendants were Russian born and well educated and had lived in the United States from five to ten years. None of them, however, had sought naturalization. The defendants admitted that they were opposed to the form of government of the United States and admitted that they had printed and distributed five thousand circulars on August 22, 1919.[5] Early in the morning the leaflets had been dropped at the corner of Houston

and Crosby Streets in New York City. Two army sergeants were sent by the Military Intelligence Police to the building from which the pamphlets had been dropped. After climbing from floor to floor and questioning the occupants, they came to a hat factory on the fourth floor. There they arrested a young Russian named Rosansky, who eventually confessed he had thrown the leaflets. Rosansky and a group of other Russians, including one girl, were captured. Jacob Abrams at twenty-nine was the oldest of the group. The four men and the girl, Molly Steimer, all lived in an apartment on East 104th Street, but they refused to disclose where the leaflets had been printed. However, the Military Police found a motor-driven press as well as a small hand press in a basement at 1582 Madison Avenue. At this address were also found corrected proofs and misprinted pamphlets.[6]

Abrams and the others based their claim of innocence on the First Amendment guarantee of free speech and the resulting invalidity of the Espionage Act as a violation of the Constitution.[7] The defendants in the case contended that the Espionage Act required that specific intent to hinder the war against Germany must be proved to validate a conviction. They argued that they had only sought to protest intervention in Russia. Judge Clayton of Alabama, the district court judge in the case, had not instructed the jury that specific intent to interfere with the war effort was necessary for conviction;

rather, he had said conviction could result even if the defendants did not have as their specific objective a limiting of the production of arms. Thus their only objective, that of stopping shipments of arms to Russia, would have been a violation because it would affect the war effort of the United States.[8]

Vigorously assailed by an article entitled "The Hypocrisy of the United States and Her Allies" was President Wilson. Also criticized was the American foreign policy. The article called Wilson a coward, claimed the proletarian government in Russia to be the only fair system of government, and called capitalism the real enemy of the people of the world. The article, signed "Revolutionists", called for all workers to awake and unite.[9]

While the writers had had as their prime objective stopping the production of ammunition to be used against the revolution in Russia, the fact that the war effort against Germany had been hindered was adequate cause for conviction. This was the conclusion reached by the majority of the Court.

The second pamphlet, signed "The Rebels", called for a general strike by all workers. In his opinion Justice Clarke felt it clear that the circulars sought to encourage resistance to the war.[10]

It was admitted by Justice Clarke that a legal difference existed between "disloyal" and "abusive" language as

applied to government, but he discounted the difference whether the "distinction is vital or merely formal." Obviously the fact that a state of war existed had a great deal to do with the verdict.[11]

The sentences imposed were twenty years in jail for Abrams, Lipman, and Lachowsky plus a fine for each of one thousand dollars. For the girl Molly Steimer the sentence was fifteen years and five hundred dollars, and for Rosansky it was three years and one thousand dollars.[12] In 1922, however, they were released on condition that they return to Russia at their own expense.[13]

Dissenting in the case were Holmes and Brandeis, with Holmes writing their opinion. It was pointed out by Holmes that the leaflets stated that those writing them hated the Germans even more than Americans did.[14] In Espionage Act cases before the Abrams case, Holmes had maintained that the result was criminal in nature. However, in the Abrams case, Holmes maintained, the uttering of words and not the possible or probable result was the crime charged. Therefore he was forced to dissent from the majority.[15]

Of particular importance in considering the case was the fact that the leaflets did not, according to Holmes, attack the manner of government of the United States. He also stated that no intent to curtail production was proved.[16]

If obstruction was the single purpose of the pamphlet, the

people distributing the leaflets could be punished. Holmes, however, felt their purpose was to stop interference by the United States in the Russian revolution.[17] Therefore, merely talking about the government's policy could not be a punishable crime. Holmes saw no danger in distribution of leaflets unless there were more to follow. He said:

> ...I do not doubt for a moment that...the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.
>
> But, as against dangers peculiar to war, as against others, the principle of the right of free speech is the same. It is only the present danger of the immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion....[18]

Two ideas were stressed by Holmes in his opinion. One of these was "intent" and the other "clear and present danger," although he did not use the term in the exact words he had used in the Schenck case. Instead, he used the phrase "clear and imminent danger." Holmes stressed that intent must be specific or forceful, and such intent was not proved here. Sentences of twenty years were too severe for publishing leaflets which, Holmes said, "...I believe the defendants had as much right to publish as the government had to publish the Constitution of the United States...."[19]

Writing to Sir Frederick Pollock, Holmes mentioned the Abrams case and stated that he felt the conspiracy was not

to obstruct the war with Germany but rather to stop United States interference in Russia. He said that he should have stressed more strongly the obstruction aspect of the case in his opinion.[20] The dissent by Holmes showed that it was not he who had left the majority, but rather the rest of the Court had abandoned the standard they had accepted with the first Espionage Act cases.

Certainly the dissent by Holmes was a ringing one, and at least one writer claimed the new American philosophy stressing the importance of open discussion stemmed directly from Holmes's dissent in the Abrams case.[21]

Another writer considered it remarkable that Holmes should have taken such a stand because Holmes was not one to be considered either soft or sentimental on free-speech issues.[22] It appeared Holmes was not weakening or showing any special sentiment by his dissent. Rather, it seemed that Holmes was seeking justice for a great injustice. Certainly worthy of just consideration were an unknown man; a silly, harmless leaflet; and a twenty-year sentence.

Writing to Justice Holmes, Sir Frederick Pollock was very critical of the majority opinion of the United States Supreme Court. He pointed out that in England the usual imprisonment for such an offense would likely have been six months or, at most, one year.[23] This was a striking contrast with the punishment imposed.

Critical of Holmes's decision was the Dean of the School of Law at Northwestern University, John H. Wigmore, who believed that neither Holmes nor Brandeis was fully aware of the dangers facing the United States and her allies during the summer of 1918. Wigmore maintained that the period between July and October in 1918 was so critical that allied efforts could not have succeeded if detriments such as that caused by Abrams were not held in check. Continuing his criticism, Wigmore suggested that both Holmes and Brandeis were indifferent toward the military situation in August 1918.[24]

The next case in which Holmes's free-speech beliefs were evident was in Schaefer v. United States, a case in which Brandeis voiced the dissent, with Holmes concurring. In question was a series of fifteen newspaper articles which stressed German strength and attacked the American purpose. The articles, printed in German, appeared in the Philadelphia Tageblatt. Though acquitted of a treason charge, Schaefer and several other officials of the newspaper had been convicted under the Espionage Act.[25] The officers of the Philadelphia Tageblatt Association included Peter Schaefer, President; Paul Vogel, Treasurer; Louis Werner, Chief Editor; Martin Darkow, Managing Editor; and Herman Lemke, Business Manager.[26]

Justice McKenna delivered the majority decision in a six-to-three verdict. Speaking for the majority, McKenna upheld the validity of the Espionage Act and reiterated the Court's

earlier stand that free-speech rights were not absolute.[27] McKenna felt the articles could easily have hindered the American cause and had been written with that purpose in mind.[28] While no evidence of any immediate result was produced, the evil, nevertheless, existed. In closing, Justice McKenna stated that the longest sentence imposed on any of the individuals had been for five years, although it could have been a twenty-year sentence.[29]

In dissent, Justice Brandeis, with Holmes concurring, cited "clear and present danger" as a basis for his dissent. An unfair verdict resulted in the lower court because of an absence of control of emotion on the part of the trial jury, wrote Brandeis.[30] Brandeis believed the suppression of the writings in the Philadelphia Tageblatt constituted a direct threat to freedom of the press. Also, he questioned the threat the small local publications could possibly have presented to the allied military and naval effort. Justice Clarke wrote a separate dissent stating that he felt the trial jury had not been properly instructed.[31]

A striking similarity to both the Abrams and Schaefer cases can be noted in Pierce v. United States. Justice Pitney delivered the majority decision in this Espionage Act case. A socialistic pamphlet entitled "The Price We Pay" was circulated by a group of men, Pierce included, and charges

were based on the pamphlet. Before circulating the leaflets, the men had failed to agree on how and when to distribute the pamphlets.[32]

The group of men had met in Albany, New York, to discuss the ordering and distribution of the circular in question. At that time they were well aware of a legal action in Baltimore relating to the distribution of the same circulars they intended to distribute.[33] Justice Brandeis mentioned in his dissent something Pitney failed to mention--the acquittal of the accused in the Baltimore case by District Judge Rose.[34] Justice Pitney referred to intent and said of the distribution, "If its probable effect was at all disputable, at least the jury fairly might believe that, under the circumstances existing, it would have a tendency to cause insubordination..."[35] Pitney said that the jury in the Pierce case decided the guilt, but it seemed certain that the persons who were tried knew beforehand the statements they were going to circulate were false. There was no doubt that the men had distributed the leaflets, and they did not deny it.

The test used by Brandeis in dissent was the one used in the first Espionage Act case. It was the "clear and present danger" test,[36] a test created by Holmes in the Schenck case mentioned in the preceding chapter. Brandeis pointed out the fact that the men had postponed their activities until the Baltimore case resulted in an acquittal

indicated they did not wish to violate the law. The information in the leaflets distributed by the men had not even been prepared by them, indicating they did not necessarily know the statements they had circulated were false. Before finishing his dissent, Brandeis used two more times the test formulated by Holmes.[37]

It is interesting to compare the Schenck case and the Pierce case. There seemed to be little reason for a verdict against Pierce and the others involved with him in the activity. Schenck wrote his literature; Pierce did not. Schenck sent his information to those drafted; Pierce sought out no special group. Schenck did not wait for any action legalizing what he did; Pierce waited for an acquittal in a pending case before he distributed the literature the group had purchased. All these facts strengthen earlier remarks in this paper that it was the majority that was changing position and not Holmes.

Another free-speech case to come before the Supreme Court was O'Connell v. United States. In question once again was an alleged violation of the right of free speech by the Espionage Act. There had been no objection to the lower court verdict of guilty. O'Connell had been given a five-year sentence for violation of Espionage Act restrictions on obstructing recruiting and enlistment. He had also been given a three-year sentence for conspiracy to violate the

Selective Service Law.[38] Several extensions were granted for O'Connell to prepare a bill of exceptions. The time limit was exceeded, but the case was brought forward for a final decision anyway. In the Supreme Court majority decision Justice McReynolds mentioned the fact that the time limit had been exceeded, and he also mentioned the constitutionality of the Espionage Act.[39] There was no dissenting decision, so the writer of this paper assumes Holmes agreed with the decision, possibly because of the strength of the evidence. He may also have agreed with the decision because of the legal technicality that the time limit in the case had been exceeded. Also, the five-year sentence, compared with that given Abrams, was relatively short, and this too may have influenced Holmes.

The threat by radical groups to the American way of life following World War I resulted in attempts to extend the provisions of the Espionage Acts to peace time. The Graham Bill, which was not passed, was such an attempt. It would have made it unlawful for anyone to speak in an assembly where the indirect result would have been to damage private property. Several states, however, passed their own espionage acts, which many people felt threatened civil liberties. Some of these laws were more drastic than those in the national code, so the natural reaction was efforts to establish more liberal and more reasonable laws relating to civil liberties.[40]

A case testing a state's power to limit speech or the press relative to wartime emergencies was Gilbert v. Minnesota.[41] Once again Holmes did not deliver the opinion. Perhaps his position in the case was surprising, but when several aspects of the case are considered, his stand becomes less unusual than it may have first appeared. An effort will be made to show why he joined the majority in this case.

Justice McKenna delivered the majority opinion in the six-to-three decision. He cited the Minnesota statute, several sections of which were similar to the Espionage Act of 1917 and its amendments the following year. The state law made it illegal to discourage anyone from enlisting in the armed forces of the state or nation. Joseph Gilbert had spoken openly and critically against government policy and had voiced a belief that we had entered the war to save England. While the state may regulate speech, declared McKenna, there were certain limits to the state regulatory power. The fact that Gilbert knew his remarks were false and the fact that a state of emergency existed were just cause to verify the lower court's decision.[42]

Brandeis and Holmes disagreed, which they rarely did. In his dissent Brandeis said that even though the states may make laws to preserve themselves, Congress had the final legal power. Brandeis declared that the state law in question was inconsistent with national laws because it violated the

Constituion. The Fourteenth Amendment's liberty clause was mentioned, but Brandeis felt there was no need to comment fully on the liberty clause because, he maintained, the law in question violated freedom of speech.[43]

Why did Holmes concur with the majority rather than with Brandeis? Hesitation on the part of Holmes to rule regarding the affairs of any individual state was mentioned in the earlier chapter of this paper dealing with free-speech cases prior to World War I. Perhaps this reluctance to rule against a state law was the reason Holmes joined the majority in this case upholding a state law. Holmes confided to Sir Frederick Pollock, that he did not agree with Brandeis because he felt Brandeis was wrong in his decision.

While disagreeing with Brandeis, Holmes also failed to agree completely with the majority. He did concur in the majority decision, but, he wrote to Pollock, "with some doubts."[44] The relatively small fine of five hundred dollars and the comparatively brief one-year prison term imposed upon Gilbert[45] could possibly have been a decisive factor in the mind of Justice Holmes. Compared to the fines and sentences imposed in some federal Espionage Act cases, the punishment here was relatively small. For example, in the Gilbert case the statements and actions threatened the welfare of few people. Gilbert spoke before a group which interrupted as well as threatened him. In the Abrams case,

several thousand leaflets were printed, several people were involved in the printing and circulating, an attempt was made to distribute the leaflets secretly, the welfare of far more people was concerned, and the penalty was much more severe.

After joining in the majority decision in the Gilbert case, Holmes quickly returned to the minority and dissent in the case of Milwaukee Publishing Company v. Burleson, decided on March 7, 1921. This time provisions of the Espionage Act relative to the mail services of the United States were involved.

Victor L. Berger, the editor of a socialistic paper, the Milwaukee Leader, was indicted for conspiracy to violate the Espionage Act. Before he was indicted, Berger had been nominated by the Socialist Party for the United States Senate. He campaigned while free on bail and advocated an immediate armistice as well as a removal of our troops from France. Even though defeated, Berger polled over 100,000 votes in Wisconsin. After he had been found guilty, he appealed; and while the appeal was in process, he ran and was elected to the House of Representative. That body, however, exercised its right to exclude members and denied him a seat.[47]

The plaintiff argued that the Postmaster General had exceeded his authority in denying the use of the mails. He contended also that the Constitution provided for punishment only if there was a direct abuse of the right of free press.

A final point brought out by counsel for Berger was that the Constitution made no mention whether freedom of speech and of the press was restricted to peace time.[48]

Justice Clarke delivered the majority decision and said the second-class mailing privilege of the Milwaukee Leader had been revoked because the Postmaster General had found articles in the paper to be in violation of the Espionage Act. An important aspect of the second-class mailing privilege was pointed out by Justice Clarke. He said that the cost of handling second-class mail was seven times the revenue it returned. The second-class rates were considered a special favor to the press because the press made a valuable contribution to public welfare. To qualify for these special rates, the mail had to be of a mailable character, but the Postmaster General's power to revoke the second-class rate had been a long established practice, concluded Clarke.[49]

The Postmaster General's study revealed the newspaper included false statements which were intended to interfere with the military efforts of the United States. The denial of the second-class privilege was upheld by the Supreme Court. Justice Clarke qualified freedom of the press as not extending to those urging a violation of the law. The Court upheld the suspension of the mailing privilege of the paper in advance because of the impracticality of reading and deciding daily on each issue of the paper. Justification of

the Postmaster General's action was based on his power to carry out all laws relative to the postal service. There was nothing in the decision of the Postmaster General to keep the publisher from reapplying for the second-class rate, nor to keep him from sending his papers by another class of mail, declared Clarke.[50]

Brandeis countered with a long dissent and Holmes with a shorter one. Brandeis said the second-class privilege was the matter in question, and that the Postmaster General could neither declare certain mail could not be carried nor deny second-class rates to future issues; the only course the postal authorities could follow was to return questionable mail.[51] Brandeis agreed that the Postmaster General should have great power, but not to deny in advance the right to use the mails.[52]

Agreeing basically with the Brandeis dissent, Justice Holmes felt it was impossible to determine in advance the mailable character of a newspaper. The only course open to postal authorities was to refuse handling a particular issue and to return it to the sender. As to the legality of the Postmaster General's action, Holmes said:

> He could not issue a general order that a certain newspaper should not be carried because he thought it likely or certain that it would contain treasonable or obscene talk. The United States may give up the Postoffice when it sees fit; but while it carries it on, the use of the mails is almost as much a part of

> free speech as the right to use our tongues; and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man.[53]

Therefore the denial of the second-class privilege was tantamount to making circulation impossible. The only power the postal authorities had was to refuse to carry the mail and return it. Holmes felt that not even the war justified the threat to individual liberties resulting from the majority decision.[54]

None of the opinions questioned the right of the Postmaster General to refuse to handle a certain issue of a publication. The question that had to be decided was the exclusion of the printed matter before it was investigated. Once more Justice Holmes maintained his philosophy that judges should not make the laws; rather, they should merely enforce them.

While the case involving the Milwaukee Leader is the last of the free-speech Espionage Act cases to be discussed in this paper, Justice Holmes was far from through with the matter of free speech after the Leader case. The close of the war saw many other cases arise involving freedom of speech, and Justice Holmes continued to speak for the protection of civil liberties.

One of these free-speech cases was American Column and Lumber Company v. United States. The main issue was whether

the Sherman Anti-Trust Act had been violated. The United States charged a conspiracy to limit competition, raise the price of hardwood, and curtail production.[55]

Justice Clarke delivered the majority opinion, citing the origin and development of a group called the "American Hardwood Manufacturers's Association" and their so-called "Open Competition Plan". Membership in the association numbered about four hundred, with 365 of these operating 465 mills. Though only about five per cent of the mills in the United States were involved, they produced about one third of the total lumber output. The government claimed the exchange of information by the members caused an increase in prices; conversely, the organization claimed the price increase was a result of weather and natural trade conditions.[56]

Members were expected to file a daily sales report, a daily shipping report, a monthly production report, a monthly stock report, a list of prices, and a report of inspections. If a member failed to report, he was dropped from membership. The organization held regular monthly meetings.[57] At these meetings members were warned to avoid increased production because it would cause a reduction in prices. The Court decided the Sherman Anti-Trust Act was violated despite the fact the information and some reports were made public and some reports were given to the Justice Department.[58]

In dissenting, Justice Holmes felt that a combination that did nothing more than procure and distribute information could not be considered as restrictive of trade. This was an especially strong argument because the information was not kept secret but was published for the benefit of all. He mentioned the free-speech aspect of the case when he said:

> I must add that the decree as it stands seems to me surprising in a country of free speech, that affects to regard education and knowledge as desirable.[59]

In the case of Leach v. Carlile, freedom of speech was threatened because an attempt had been made by the Postmaster General to stop mail before it was sent. The mailing had been stopped because of a claim that it contained false advertising. Being sold through the mails was a curative product which postal authorities considered to be incorrectly advertised. The product, "Organo Tablets", was advertised by a Chicago man selling patent medicines.[60] Advertising through the mail was his method of selling his product. The Postmaster General decided the product being advertised through the mail was a fraud and ordered a halt to the questionable mail. His decision was based on the fact that the claims of the appellant were not justified by competent medical opinion.[61]

The mail had been used extensively as an advertising media, and statements describing the product as being highly recommended by medical leaders had been included.[62] When a

fraud order had been issued earlier, Leach had promptly changed his trade name. Justice Clarke stated that there was some conflict in the evidence presented, but since the product was so far from being the cure the seller claimed it to be, the fraud charge was valid. It was also pointed out that the established rule was not to review the decisions of government department heads if ample evidence existed to support them.[63]

Holmes, in dissenting, did not question the validity of the statute in question; but there were certain aspects of the case Holmes felt had not been adequately considered. While many modern inventions could aid in advertising, letters remained as an important means of communication, said Holmes. He stressed the importance of freedom of expression when he said:

> I do not suppose that anyone would say that the freedom of written speech is less protected by the First Amendment than the freedom of spoken words. Therefore I cannot understand by what authority Congress undertakes to authorize anyone to determine in advance, on the grounds before us, that certain words shall not be uttered. Even those who interpret the Amendment most strictly agree that it was intended to prevent previous restraints....If the execution of this law does not abridge freedom of speech, I do not quite see what could be said to do so.[64]

Holmes concluded his dissent by stating that he did not feel the First Amendment validated the Postmaster's action. Brandeis concurred with Holmes in dissent.

Freedom of speech was the main issue in several Supreme

Court cases regarding the "liberty" clause of the Fourteenth Amendment. For example, questioned in Meyer v. Nebraska was the legality of a state law requiring that the instruction of children be conducted only in the English language until the child passed the eighth grade. The plaintiff claimed this requirement of the Nebraska law to be a violation of the Fourteenth Amendment.[65]

Delivering the facts of the case and the majority opinion was Justice McReynolds. He stated that the plaintiff had been tried for and convicted of teaching a parochial school student, Raymond Parpart, in German. Violated was a state law entitled "An Act Relating to Teaching Foreign Languages in the State of Nebraska." The first section of the law stated that no language other than English could be used, while the second section declared that only after having passed eighth grade could a child be permitted to receive instruction in a foreign language. Punishment was set by the third section. A fine of twenty-five to one hundred dollars or a jail sentence not to exceed thirty days was provided in the act.

The state maintained that it was desirable and necessary that instruction be conducted in the English language, and that such a requirement was not an unreasonable restriction.[66] In reversing the lower court decision, McReynolds declared that the challenged state law was unconstitutional

because no cause could be shown why a certain language may be harmful. Justices Holmes and Sutherland dissented, but neither wrote an opinion.[67]

Several cases concerning state laws similar to the one involving Meyer were reversed on the same day as the Meyer adjudication.[68] Three of these cases involved individuals taking action against a state. These cases were Bartels v. Iowa, H. H. Bohning v. Ohio, and Emil Pohl v. Ohio. Decided also was a case in which a parochial school brought action against the state governor, the attorney general, and the county attorney. This case was Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio, and Other States v. Samuel R. McKelvie, Clarence A. Davis, Otto Walter, and their Deputies, Subordinates, and Assistants.[69]

A separate decision relative to the Bartels case was written by Justice Holmes, with Justice Sutherland concurring. Bartels, though having taught his students their regular subjects in English, had also taught them to read German. There seemed to be little question regarding the value of all citizens speaking the same language, said Holmes. A common language appeared to be the objective of the Iowa law. The question was whether or not the "liberty" protection of the Fourteenth Amendment was violated by a state law requiring that only English be taught until after the eighth grade. Since familiarity with a language is achieved more readily

during the years of youth, Holmes said it was desirable that the national language be learned then. Thus if a child lived in an area where a foreign language was spoken, there seemed to be no place other than in school for the child to acquire a knowledge of English. Such a restriction, concluded Holmes, was not an unreasonable restriction on the "liberty" of either the teacher or the student.[70]

Once again Holmes did not seek to declare a state law invalid; rather, he viewed the law as an experiment which the state should have been allowed to try. It seemed that he wished this experiment be given a chance, with the ultimate welfare of the individual paramount.

During the war or soon after the war many states adopted laws which were known as criminal syndicalism laws. The main purpose of these laws was to curb radicals. The Supreme Court case of Gitlow v. New York was one of the most important cases involving individual rights ever to be decided by the Court. Though the defendant did not win his case, for the first time in history the Court recognized that the "liberty" phrase of the Fourteenth Amendment extended to speech and the press. Holmes and Brandeis held the same view as the majority regarding the "liberty" protection of the Fourteenth Amendment, but they did not agree with the majority regarding the disposition of the case.

Gitlow had been indicted along with three other people in 1919. He was tried separately, convicted, and sentenced,

with the judgment affirmed by both the Appellate Division and the Court of Appeals in New York. It was on a writ of error that the case came to Washington and the Supreme Court.[71]

The Supreme Court argued the case first on April 12, 1923, and the decision was finally given on June 8, 1925. Gitlow's stand was based on these points: (1) liberty in the Fourteenth Amendment extends to speech and the press, (2) the New York statute in question unduly restricts freedom of speech, (3) English law doctrines on which the New York law was based are inconsistent with those of American law, and (4) the New York law violates due process of law. On the other hand, the case against Gitlow included the following: (1) freedom of speech is not absolute, (2) English common-law is the basis for our law, (3) the New York law does not violate due process, (4) the defendant advocated an overthrow of government, and (5) "The Left Wing Manifesto" advocated force and violence to overthrow the government.[72]

Violation of a New York criminal anarchy law was the basis for Gitlow's conviction, wrote Justice Sanford in the majority opinion. Two sections of the New York Penal Laws concerning a definition of criminal anarchy and the advocation of such a doctrine were involved. Punishment included a fine, or a prison term, or both. The law had been passed in 1902 following the assassination of President McKinley and had been used by New York in 1919 to curb opposition to World War I by those supporting the Russian Revolution.[73]

The first count charged that "The Left Wing Manifesto" advocated the government by overthrown by force. The second count charged that "The Revolutionary Age" contained similar writings. Proof of Gitlow's membership in the Left Wing of the Socialist Party was evident. A national meeting of the group produced the "Manifesto," which was published in "The Revolutionary Age." Gitlow, the business manager, arranged for the printing of sixteen thousand copies. He also directed the selling and sending and spoke to groups, urging them to take action on the principles set forth in the writings.[74]

Justice Sanford sought to establish in his opinion that the aim of the pamphlets was action rather than a mere statement of principles. Conviction was based, said Sanford, on the fact that action was urged.[75]

A very important statement, regarding Gitlow, was included in Sanford's opinion as he said, "There was no evidence of any effect resulting from the publication and circulation of the Manifesto."[76] The question immediately arising, quite logically, is just what criterion was used to uphold the conviction in the case? If there was no danger produced, what could have been the basis for the decision of a judicial body that had decided World War I cases by applying the "clear and present danger" test?

The advocated doctrine had urged mass strikes or

revolutionary action instead of legislation to achieve the goals sought.[77] Counsel for Gitlow objected to evidence brought forward under indictment in the lower court as a violation of the Fourteenth Amendment. This objection was not allowed, however.[78] A similar denial resulted when Gitlow's defense requested that the court use as a definition of criminal anarchy the urging of immediate action by force or violence.[79] Justice Sanford, in upholding the law, said the only real question was whether the defendant in this case had been deprived of his freedom of speech by due process in the Fourteenth Amendment. The use of language that would incite rather than inform would be punishable.[80] Violence was suggested in the writings, continued Sanford.

The inclusion of the word "liberty" in the Fourteenth Amendment was supported by the Court in regard to freedom of speech and the press as Justice Sanford said:

> For present purposes we may and do assume that freedom of speech and of the press--which are protected by the First Amendment from abridgment by Congress--are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the states.[81]

The use of the Fourteenth Amendment's "liberty" clause as a restriction on the legislatures of the individual states was a great step in the insurance of personal liberty.[82]

Justice Sanford's opinion referred to free speech; he said the rights of the Constitution are not absolute. To

substantiate his remarks, Sanford mentioned the Schenck decision given by Holmes. A reference to the "clear and present danger" test was made by Sanford, but he said that in this case the legislature had previously determined just what may be said, and therefore the "clear and present" test need not be used for this decision.[83] The decision was affirmed by the majority even though advocacy had been in general terms, immediate action had not been urged, and the statements had not been directed to any specific group.

In this case a test of "remote possibility" or "bad tendency" was formulated by the majority. Thus any speech that may possibly be harmful to the government would be in this category.[84] The Court now had two tests it could use.

Brandeis and Holmes dissented, but both agreed with the view of the majority regarding the Fourteenth Amendment's "liberty" clause as a protective of free speech. Holmes in his dissenting opinion cited the precise term "clear and present danger" for the first time since his majority opinion in the Schenck case. Holmes said regarding Gitlow:

> If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this Manifesto was more than a theory, that it was an incitement. Every idea is an incitement....

Holmes also maintained that the writings under question could not possibly have provoked any serious trouble. It was

imperative, he felt, that the speaker should have a chance to be heard. The case would have had a different aspect, believed Holmes, if an actual attempt had been made to start an uprising against the government.[85]

Perhaps worthy of note is the fact that between the time of the Abrams case and the Gitlow case the personnel of the Court had undergone a great change. As a result, a majority of twelve justices actually rejected the "clear and present danger" test, and only two, Holmes and Brandeis, accepted the test.[86] Holmes's test was practically ignored by the majority in this case. The conviction was based on words that were forbidden rather than words that produced any danger.[87] While Gitlow failed to see his conviction reversed, the protection of free speech from abridgment by the individual states had been assured by the statement of the Court.

Perhaps the feelings of Justice Holmes may best be illustrated by an excerpt from a letter written by Holmes to his friend Harold J. Laski. In a letter dated June 14, 1925, Holmes said:

> The last day of Court I let out a page of slack on the right of an ass to drool about proletarian dictatorship but I was alone with Brandeis. Free speech means to most people, you may say anything that I don't think shocking.[88]

Justice Sanford delivered the opinion of the Court in Whitney v. California, decided in 1927. Being tested under

the Fourteenth Amendment was a state criminal syndicalism law.[89] Charlotte Anita Whitney was a resident of Oakland, California, and had been a member of the Socialist Party. She was a member of a local group which had broken away from the Socialist Party and joined the Communist Labor Party of America. Miss Whitney took an active part in the organization, which adopted a national program.[90]

Miss Whitney's defense counsel claimed the state law in question was a deprivation of the right to equal protection guaranteed by the Fourteenth Amendment. She claimed that she had not foreseen what the organization was doing. But she had taken part in the convention, and the evidence showed that she was aware of what was happening. Her claim that the Syndicalism Act was not explicit enough in the definition was rejected by the Court.[91] The term "criminal syndicalism" was specifically defined in the first section of the California law as the use of terror or violence to accomplish either political change or a change in industrial ownership or control.[92]

The Court also rejected a claim that equal protection was denied by any differentiation between advocating a resort to violence to change conditions and advocating a resort to violence to maintain existing conditions.[93] Justice Sanford concluded the majority opinion by upholding the Syndicalism Act and declaring that it was not restrictive of freedom of speech or the press.[94]

Justice Brandeis concurred in the decision but wrote a separate opinion, with Justice Holmes in agreement. The state's power to restrict freedom of speech had been established previously, but no fixed standards had been set. Evidence had to be presented, continued Brandeis, to show that a serious danger was imminent. The free-speech question did not figure in the case because Miss Whitney claimed the statute violated the Constitution of the United States. No request was made by the defendant that the statute be tested on the "clear and present danger" issue. Since necessary evidence did exist in the case, Brandeis believed the lower court's verdict could not be changed.[95] Justice Brandeis, with Holmes in accord, spoke out for freedom of speech in his opinion, but the disposition of the case removed this as an issue. Thus the only test in the case was the validity of a state law, concluded Brandeis. Had Miss Whitney brought her case to be reviewed as a test of innocence or guilt rather than a question of the validity of the state law, the issue probably would have brought a different reaction from Holmes and Brandeis. Just how the rest of the Court would have reacted is merely a speculation.

On the same day as the Whitney adjudication, the Court reversed a conviction in the criminal syndicalism case of Fiske v. Kansas. The evidence against the defendant was a copy of the preamble to the constitution adopted by the

Industrial Workers of the World. Fiske claimed this to be insufficient reason for conviction. The Supreme Court reversed the state decision and maintained that there was nothing in the questioned preamble to warrant conviction.[96]

While both the Fiske and Whitney cases concerned state criminal syndicalism laws, one judgment was reversed, and the other was upheld. In neither case did the United States Supreme Court rule a state law invalid. The fact that Whitney sought to have the state law declared invalid, whereas Fiske sought to have the conviction against him reversed because he had not violated the law, was a most important factor. When Miss Whitney was informed of the decision, she stated that she would not appeal to the California governor because, "I have done nothing to be pardoned for."[97]

A civil liberty case quite unlike any of the free-speech cases discussed thus far is being included in an attempt to investigate the views of Holmes in as many different kinds of free-speech situations as possible. The unusual aspect of this case was the question of the legality of evidence secured by wiretapping--whether fundamental rights guaranteed by the Fourth and Fifth Amendments had been violated by the action of the federal agents who had resorted to wiretapping to secure evidence.

Chief Justice Taft gave the majority opinion. An extensive conspiracy existed to violate the National Prohibition

Act. Seventy-two individuals were indicted; a number of them pleaded guilty, others were acquitted, and some were not apprehended. Roy Olmstead was the general manager and largest financial contributor in their business centered in Seattle.[98]

Evidence was gained primarily by wiretapping, but Justice Taft pointed out that the federal officers were not trespassing on the property of the defendants because the lines tapped were lead-in lines. It was stated by Justice Taft that the situation was different than if letters or papers had been seized or opened. Since the wires were not part of the property, they were not protected. If Congress were to pass a law making evidence obtained by wiretapping inadmissible, continued Taft, the disposition of the case would have been different. In conclusion Taft said that until legislative action was taken making wiretapping illegal, the Court was upholding this method of gaining evidence.

Dissenting Justice Brandeis declared that no difference existed between sealed letters carried by the government and private messages transmitted by telephone.[99] Brandeis further maintained that the government had resorted to breaking the law to gain evidence.[100] Justices Butler, Stone, and Holmes also dissented in the five-to-four decision.

Justice Holmes declared he did not believe evidence should be gathered by criminal means. While no precedents

existed to settle the disposition of the case, Holmes believed the government had two choices: the first of these choices was the necessity of catching criminals; the second choice was whether in capturing criminals, the government should itself promote crime. Obviously a decision had to be made, and Holmes's view of governmental use of wiretapping to secure evidence was clear as he said, "For my part I think it a little less evil that some criminals should escape than that the government should play an ignoble part."[101]

Few would question that among judicial expressions of free speech the World War I opinions of Justice Holmes were among the finest ever voiced. Holmes spoke first for the majority and then in dissent. The words of Holmes in both instances have often been repeated. During the late twenties and early thirties Holmes did not write many opinions in this field, but was usually found dissenting or concurring. Once, though, during this period, in United States v. Schwimmer, the old champion of free speech voiced a ringing dissent.

After the syndicalism cases in 1927, there was a period of relative quiet in the free-speech cases until 1931. The relative silence was shattered in 1929 when the Schwimmer case was decided. This was the last time Holmes was to write an opinion in a free-speech case. It is only fitting that his last opinion on freedom of expression was a paragon.

Justice Butler delivered the majority opinion and gave

some facts relative to the defendant. Born in Hungary in 1877, Rosika Schwimmer, the defendant, came to this country in 1921 to visit and to lecture.[102] During World War I Mme. Schwimmer became an important figure in the United States. A citizenship petition was filed by her in 1926. In answering the question of whether she would be prepared to take up arms to defend the United States, Mme. Schwimmer stated that she would not personally take up arms. She was quite willing to serve the country but not to the point of defending the country by the use of arms.[103]

The majority of the Court maintained that individual defense of the Constitution was a fundamental principle, and anyone in opposition should not, therefore, be granted citizenship. The age or sex of the person applying for citizenship was not important, believed the Court, because neither age nor sex makes a person any less responsible in upholding the duties of a citizen. Naturally it was quite doubtful that a fifty-year-old woman would ever have to perform military duties.[104] Naturalization rights had been denied by a federal district court. A circuit court of appeals reversed this decision on the grounds that a woman was not capable of bearing arms. The Supreme Court denied her citizenship.

The Court was split by a vote of six to three in the case, with Brandeis concurring with Holmes's opinion. Justice Sanford agreed with the decision as voiced by the circuit

court. The Supreme Court's decision was made on May 27, 1929. Less than three weeks later Holmes wrote to Harold J. Laski in England. In that letter Holmes confided to Laski that he believed the fact that Schwimmer was an atheist had caused many people to oppose her.[105]

Justice Holmes, in dissenting, felt the views expressed by Mme. Schwimmer were honest beliefs, and in not wishing to bear arms she was merely maintaining her views as a pacifist. If she did not prefer the United States, she never would have applied for citizenship. Her belief that war would ultimately disappear and peace reign supreme over the earth was a conviction worthy of admiration. Since she held such an ideal, there appeared no reason to Holmes why she should not be allowed to keep seeking such a noble goal and also be a citizen. Holmes said:

> ...If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought--not free for those who agree with us but freedom for the thought of that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within, this country.[106]

Before the Schwimmer case Holmes had written to Laski and stated how he felt about the case. The entire question seemed to Justice Holmes a bit foolish. Holmes said, "All ism's seem to me silly--but this hyperaethereal respect of human life seems perhaps the silliest of all."[107]

After Holmes had retired from the Court in 1932, Mme.

Schwimmer made the personal acquaintance of the former Justice. She had also become a friend of Dr. Albert Einstein. When asked by Mme. Schwimmer if he would like to meet Dr. Einstein, Holmes replied that he would be delighted. In a book Dr. Einstein had stated that he did not feel Mme. Schwimmer should have been denied citizenship because of her refusal to bear arms. Justice Holmes had voiced a similar opinion, and now she wanted her two "favorite authors" to become acquainted.[108]

Justice Holmes did not write an opinion but agreed with the majority decision of Chief Justice Hughes in Stromberg v. California. Questioned in this 1931 case was the Fourteenth Amendment's protection of freedom of speech. Conviction was based on the displaying of a symbol, in this instance, a red flag, in opposition to the government.[109]

Yetta Stromberg was a nineteen-year-old supervisor of a summer camp for children ten to fifteen. A red flag was raised daily, and a pledge emphasizing working-class freedom was recited. The lower court charged the jury with the necessity of finding the appellant guilty of either violence, anarchism, or sedition. While Stromberg did not challenge the charge, she maintained that the state law was unconstitutional.[110]

The challenged California law contained a section that was questionable regarding its constitutionality. The lower

court delivered a general verdict but did not specify which section of the law she had violated. Since the lower court did not specify upon which clause the decision was based, the Supreme Court did not uphold the conviction. The displaying of a red flag in opposition to organized government came under the section of the California law that the Supreme Court considered very vague. Hughes declared, therefore, that the Fourteenth Amendment's guarantee of liberty had been violated, and the decision had to be reversed.[111]

Justice McReynolds dissented because he felt the decision had been reached merely because a part of the law was invalid. Justice Butler felt the decision was based on the first clause. He believed Stromberg had not, however, violated the first clause.[112]

The liberty of the individual was upheld in the case, and once again, Holmes was on the side of the majority. A hesitancy on the part of Justice Holmes to nullify any state law has been noted oreviously in this paper. The Court declared just one clause of the California law to be invalid. That section was so vague that it could not uphold a conviction, declared the majority. It is perhaps noteworthy that the Court was increasingly protecting individual rights, pointing the way to the future. The protection of civil liberties had not yet been assured, however, as the next case will show.

Also involving a pacifist, the case of United States v. MacIntosh was much like the Schwimmer case. Douglas Clyde MacIntosh had been denied citizenship because he had refused to promise to bear arms in any war he did not feel morally justified. Although born in Canada, MacIntosh lived in the United States from 1916 to 1925, when he expressed a desire to become a citizen. All the formal legal requirements were met by MacIntosh, but when asked if he would promise to take up arms to defend this country, he qualified his affirmative answer with, "Yes, but I should want to be free to judge of the necessity."[113]

MacIntosh declared he was not a pacifist. However, he said he would fight only in a war he considered morally justified. Justice Sutherland in giving the majority opinion followed the principle in the Schwimmer case. In a prepared statement MacIntosh cited what he considered an inequality in American law in that conscientious objectors did not have to bear arms while aliens seeking naturalization had to promise to bear arms. Sutherland felt there was no reason to believe that Congress would not exempt conscientious objectors in the future as had been done in the past.[114]

Dissenting Justice Hughes had Justices Holmes, Stone, and Brandeis in agreement in the five-to-four decision. MacIntosh had served as a chaplain in France with the Canadian Army, but he had refused to take the naturalization oath without qualifying his position.

The only real question, according to Hughes, was whether Congress had enacted a requirement that individuals must promise to bear arms. Hughes stated that Congress had not done this, and to make such a requirement valid, it must be specifically stated.[115]

Justice Hughes did not feel the general terms of the act, setting naturalization standards, required a promise inconsistent with the religious scruples of individuals. Many conscientious people, for example, had served as chaplains, nurses, and in other noncombatant capacities. Hughes did not feel that Congress sought, by the creation of the naturalization oath, to exclude those whose religious scruples did not permit them to bear arms.[116]

The alignment of the Court remained the same in United States v. Bland, decided on the same day as the case involving MacIntosh. Justice Sutherland again gave the decision. Marie Averil Bland stated she would only take the naturalization oath with one qualification. With regard to defending the United States against all enemies, she insisted upon the insertion of the words "as far as my conscience as a Christian will allow."[117]

Again Justice Hughes spoke for the dissenting members of the Court. The patriotism of the defendant was unquestionable because she had served the United States for nine months as a nurse in France. Those dissenting felt that

religious convictions keeping her from bearing arms should not deprive her of citizenship. The oath, Hughes believed, should be taken at its true significance and not as an outright promise to bear arms.[118] Just as in the Schwimmer case, it seemed highly absurd to consider that she would be called upon to take up arms. The precious right of citizenship was, however, denied her.

The opinions of Justice Holmes regarding free speech finally became the law in 1931. In Near v. Minnesota, freedom of the press was endangered by a Minnesota law which authorized officials to issue a permanent injunction against publishing the paper. The "liberty" clause of the Fourteenth Amendment was claimed by Near to guarantee free speech; the state argued the protection did not extend to obscene, scandalous, or defamatory literature.[119] Chief Justice Hughes spoke for the majority in the five-to-four decision, with Justices Holmes, Brandeis, Stone, and Roberts concurring, and Justices Butler, Van Devanter, McReynolds, and Sutherland dissenting.

The statute in question had been enacted in 1925. Justice Hughes pointed out in his majority opinion that a temporary injunction was provided by law, with the defendant having the right to reply. After a trial a permanent or temporary injunction could be issued, and a one thousand dollar fine and imprisonment up to twelve months could be imposed if the defendant was found guilty.[120]

A periodical called The Saturday Press contained articles charging that several officials in Minneapolis were permitting gambling, racketeering, and bootlegging. The articles also alleged that a Jewish gangster controlled the city. Near claimed the protection of the Fourteenth Amendment and denied the articles were of a malicious or defamatory nature. The defendant was found guilty, however, and was forbidden to publish.[121]

Hughes considered the state law "unusual, if not unique" in structure.[122] The Court had accepted in the Gitlow case the principle that freedom of speech and of the press are protected from state interference by the due process clause of the Fourteenth Amendment.

The Minnesota law did not require proof that the statements made in the publication were false in order to secure a permanent injunction. Once the injunction had been secured, the publisher had to prove the statements were true before he could print and circulate his periodical again. This would, in effect, serve to suppress the publication completely.[123] The Court ruled the statute invalid because the legislature could require the publisher to produce evidence at any time showing that the statements were true. The "liberty" guarantee of the Fourteenth Amendment settled the disposition of the case. The Court ruled that the state law violated a constitutional amendment. There was no need, therefore, to prove that the charges were false.[124]

Justice Butler, in dissent, felt that the decision left the states without control over any material published.[125] He contended that the previous-restraint protection did not extend to a continuing offender.[126]

The long period of Holmes's dissent thus had drawn to a close. It was perhaps a stubborn Justice Holmes who had dissented in the Abrams case, but it was a man fighting to guarantee the rights of free men in a country symbolic of freedom. It may have been fortunate in one respect that he and the majority of the Court disagreed. He was able to speak much more effectively than if he had been the spokesman for all the justices. By dissenting he could say just what he believed and not have to compromise with other members of the Court.

CHAPTER VI

SUMMARY AND CONCLUSIONS

Few judges in the history of the United States Supreme Court have made as profound an impact on the nation's judicial system as Justice Oliver Wendell Holmes made. Praised by many, criticized by some, and respected by practically all, Justice Holmes has remained a symbol of justice. His career has been traced in this paper in an effort to show the views of Justice Holmes on free speech from the beginning of his career until the culmination of his judicial work. Serving from December 4, 1902, to January 12, 1932, Holmes was on the Court for more than a fifth of the Court's history at the time of his resignation. Even more impressive is the fact that during his stay on the Court more than one-third of the adjudications in the history of the Court to the time of his retirement had come before the high tribunal. While the number of decisions was great, the historic significance of the decisions is far more important. Many issues, which had ominously grown from the time of the Civil War, could no longer be pushed aside for another generation to decide.[1]

An attempt will be made in this chapter to draw some conclusions on the free-speech doctrines of Justice Holmes. Several topics will be covered. The content of the discussion of each of these areas or topics will be mentioned prior to the discussion of each topic. The first of these

topics concerns attempts to classify Holmes.

Attempting to place Holmes in any socio-political group is a difficult task. While some called Holmes a liberal, others called him a radical. This writer feels it would be erroneous to place Holmes in any category because a judge must adhere to certain established judicial principles and precedents. Therefore, a decision or opinion may not really represent what he personally believes. The classification of a judge cannot possibly be based on a single decision. The writer of this paper noted an inability on the part of others writing about Holmes to agree on classification. It was interesting, however, to see what various writers have thought of him.

While the radical frequently claimed a friend in Holmes, the judge was not a radical, stated Harold J. Laski, a long-time friend of Holmes. Laski felt it was Justice Holmes's belief in experimentation that caused some to view him in this light.[2]

Some skeptics have felt Holmes belonged to their group because Holmes remained skeptical, not because of any loss of faith in the world but rather because of a desire on his part to gain enlightenment. What he wished to do was to bring to law the constant search or questioning employed by scientists. His skepticism was quite unlike many other forms of skepticisms in one basic way: he sought to create; the

only aim of many skeptics was to destroy.[3] Benjamin N. Cardozo, writing before he joined the Supreme Court, indicated that Holmes's skepticism was evident because he remained skeptical of many things that were claimed to be final.[4] Holmes was even skeptical of himself, concluded Cardozo.

Those writers who speak of Holmes as a liberal are very careful about what they say. Most of them refrain from classifying Holmes because of the difficulty of the task. At times he exhibited a liberal outlook, but at other times a different outlook was obvious. The biographer Silas Bent avoided classifying Holmes; he described Holmes as neither a liberal nor the champion of either the weak or the strong, or of labor or capital.[5]

Holmes was spoken of as a liberal by John Dewey. Dewey wrote that Holmes felt the best test was experimentation. This experimentation must continue, and man must never feel he has found the final truth. Dewey felt that the judge did not discount logic, but too many variables existed to decide issues by any fixed concepts.[6]

While he was called a great liberal by many, Justice Holmes had no use for reformers or liberals per se. Oswald Villard wrote in Nation that Holmes had become an idol to the progressive, but he did not consider himself a progressive.[7] Holmes was spoken of as a liberal and a leader for freedom, but he refused to be allied with any group or movement.

Benjamin N. Cardozo, the man who was to replace Holmes on the Supreme Court, wrote that Holmes constantly sought to find the truth, knowing full well that truth is never absolute.[8] While called a liberal, Holmes fully realized that there existed a need for give and take in law. This fact was very likely the reason why Holmes did not stick to any single concept or idea of legal interpretation.[9]

Joseph Pollard wrote in Forum that a liberal constitutional view was maintained by Oliver Wendell Holmes and Louis D. Brandeis from the start of World War I until 1925. Pollard added that in 1925 Harlan F. Stone joined the two liberals. Finally in 1930 the death of conservatives William H. Taft and Edward T. Sanford brought the appointment of liberals Owen J. Roberts and Charles Evans Hughes and gave the Court a liberal majority. The liberal views of Roberts and Hughes were maintained despite the fact that they were both men of wealth.[10]

Dorsey Richardson wrote that any classification of Holmes as a reactionary would be grossly incorrect because a reactionary would find any written or spoken words which advocated a change to be in direct violation of the law. The opposite extreme would be to call Holmes a radical. Holmes certainly was not at this pole. The Abrams case was a clear indication of this as Holmes heartily voiced his disapproval of the action of the majority of the Court in

taking the doctrine established in the Schenck case and extending it to an extreme. Dorsey Richardson further claimed that there were just two things which caused Holmes to dissent: any violation of public policy, and any violation of fundamental justice.[11]

Next in this paper the views of Justice Holmes on dissenting will be discussed. While Holmes was called "The Great Dissenter," he was not the most frequent dissenter on the Court. (Justice Samuel Miller voted in the minority in about one-fifth of the cases in which he took part.) Holmes did not like to be termed a dissenter. He did note, however, one big advantage in dissenting. When dissenting, a judge could speak more freely than if he were speaking for several other judges as well as himself. Very often the work of the majority was a compromise. Any such compromise, felt Holmes, generally weakened a decision. Holmes was apparently conscious of the frequency with which he and Brandeis dissented. Evidence of this is found in three letters written by Holmes within a relatively short period during 1928. The letters were written to Laski and were dated February 18, May 12, and June 12.[12]

The fact that Holmes frequently dissented has been pointed out in the preceding paragraph. But even when he did not dissent, other members of the Court did not always agree with his methods. The basic system the Supreme Court

followed was to discuss a case and then have the chief justice assign an associate justice to the case. Once this had been accomplished, a draft opinion was written and circulated among the other justices before a final decision was reached. Holmes's colleagues frequently felt the wording of his opinions was too severe and that he could be somewhat more tactful in what he wrote.[13]

The criticism Holmes received must also be mentioned. The meager criticism that he received is in sharp contrast with the criticism the Supreme Court, of which he was a member, received. A tribute to the greatness of Holmes is the fact that there were few people who could find fault with his judicial doctrines, and the dissident individuals or groups later saw the judicial doctrines of Holmes become part of American law.

How did Holmes react to criticism? While not showing it, he had a sensitivity to any unkind or unfavorable comments about him. Evidence of this sensitivity was contained in the personal correspondence between Holmes and Sir Frederick Pollock. Holmes confided to Pollock his belief that the money powers felt he was dangerous. Statements in the New York Evening Post calling Holmes brilliant rather than sound likewise brought a negative reaction from him. The Nation, he continued, had been critical of both his father and him.[14]

Max Lerner has written much about Justice Holmes, most

of which has been favorable. However, Lerner did find fault with Holmes's belief that the test of truth was the ability of something to survive. Lerner believed Holmes's test of truth was inadequate because the enemy can manipulate propaganda so that it may be accepted. Apparently Holmes viewed the enemy as incapable of twisting opinion, according to Lerner.[15]

A critic of the "clear and present danger" test was Corliss Lamont. Writing in Freedom Is as Freedom Does, Lamont stated that the test gives too wide a range for either side in arguing a free-speech case.[16]

The famous "clear and present danger" test became subject to criticism from other judges. Felix Frankfurter, though often praising Holmes, did not use the test created by Holmes. Frankfurter stated his reasons in Dennis v. United States. Both Chief Justice Charles Evans Hughes and Chief Justice Harlan F. Stone resolved free-speech questions as due-process questions.[17]

Criticism was aimed at Holmes in American Mercury by H. L. Mencken because of Holmes's belief that the legislature is the voice of the people. Mencken believed that pressure groups exert a great deal of influence, and as a result it is accurate to consider the legislature expressive of the belief of the majority. Continuing in his criticism of Holmes, Mencken said that pressure groups were able to

influence Holmes.[18]

Mencken was critical of Holmes because of the latter's talent for writing, claiming that Holmes was more interested in writing than in justice. He also said that Holmes never gave any great thought to the battle of ideas in his time. There were times when Holmes would go to an extreme to protect freedom, but at other times he would repress freedom, concluded Mencken.[19]

Many favorable comments have been made about Justice Holmes. The famous legal authority, Roscoe Pound, wrote that Holmes was fully twenty to thirty years ahead of the other judges of his day on such things as: (1) a break with historic method, (2) a study of methods of legal logic and judicial thinking, (3) a recognition of policies and their relation to legal decision, (4) a recognition of conflicting interests and a necessity for compromise, (5) a disregard of that which is termed "right" in order to find more effectively and improve law, and (6) a unification of methods which were formerly exclusive to a certain field.[20]

There were many more favorable than unfavorable comments made about Justice Holmes. To repeat all of the words of praise that have been written or spoken about Holmes would require many pages. Perhaps one brief quote from Felix Frankfurter, written before he had become a member of the Supreme Court, will serve to show the high regard many people

had for Holmes.

Regarding Holmes and civil liberties, Frankfurter wrote:

> What Mr. Justice Holmes did during his thirty years on the Supreme Court to vindicate the claims of Anglo-American liberty through law has not been exceeded by any judge.[21]

The last part of this chapter will be a final summarization of the constitutional doctrines of Justice Holmes relative to freedom of speech.

Max Lerner wrote that Holmes did not believe the Bill of Rights established any absolute guarantees. Certain limits of civil liberties, Holmes felt, had to be maintained. In determining any constitutional limits, one had to consider the welfare of both the individual and society in general.[22]

Dorsey Richardson made a careful study of the constitutional doctrines of Justice Holmes. He considered the most important of Holmes's opinions involving the Bill of Rights those opinions relative to the First Amendment and free speech. Richardson said that Holmes did not rely on a legal interpretation which would use only previous restraints on free speech, nor did he rely on a legal interpretation of no restraint. This interpretation would give the writer or speaker absolute immunity to speak with complete disregard for others. His decisions were based on the drawing of a line between personal liberty and public welfare.[23] Early

in his Supreme Court career Justice Holmes accepted the previous-restraint theory when he spoke for the Court in Patterson v. Colorado. It should be noted that the previous-restraint theory was the prevailing theory at that time. By the time of World War I the previous-restraint theory was completely out ot date. Under the previous-restraint protection a newspaper could publish secret military information and not be restrained. After the publication the publisher could be punished, but in the meantime the information could have changed the outcome of a battle or even a war.

Throughout Holmes's early years on the Court, and up until the time of the dissenting opinion in the Abrams case, Holmes, in limiting free speech, discussed and decided free-speech cases basically from the viewpoint of society.[24] He later believed that speech should be held in check only if restraint was absolutely necessary. Protection of the right of free speech by Holmes was merely one aspect of his philosophy of broad tolerance for social legislation.

In the Abrams case, applying the test of "a clear and imminent danger" set by Holmes was nothing more than stating that the case would depend upon the relevant information found.[25]

Justice Holmes agreed with the majority that freedom of speech is guaranteed by the Fourteenth Amendment. This was a most important step toward the incorporation of the First

and Fourteenth Amendments. Justice McKenna took the first step in this direction in the case of Gilbert v. Minnesota, a case in which Holmes concurred with the majority, as was pointed out previously.

Next, in the Gitlow case the Court deliberately announced that the Court, under the Fourteenth Amendment, had the power to review laws concerning state free-speech laws. In the Schenck case the test of "clear and present danger" had been established. The Court now had two aids, that were not available before World War I, in deciding free-speech cases.

The trend of the Supreme Court majority in the 1920's was to restrain freedom of speech. It was not until the 1931 case of Near v. Minnesota that the Court began to accept new principles regarding free speech.[26]

A gradual trend toward greater protection of individual freedom could be noted on the part of Holmes during his term as a judge. Holmes did not break from the majority; rather, various aspects of the cases caused the majority to differ with Holmes in later cases. Throughout his career Holmes sought to protect the rights of individuals. But the majority of the Court differed with Holmes. The Court majority was limiting civil liberties; Holmes was attempting to extend basic freedoms. The first case in which it was obvious the principles maintained by Holmes were to be in conflict with those of the Supreme Court was the Abrams case. There seemed

to be, logically, a much greater emphasis placed on personal freedom by Holmes after the immediate danger of World War I had passed. Convincing the conservative majority on the Supreme Court at that time proved to be most difficult, and increased protection of the freedom of speech developed very slowly. Justice Holmes continually sought to protect the rights of citizens to a greater degree, protesting against any denial of individual rights. The trend of the Court through recent decades has been to protect to an even greater degree the rights of individuals. The decisions of the Court have proved Holmes a prophet of the future, a future that is the United States of our day.

The long and distinguished career of Justice Oliver Wendell Holmes was marked by intense devotion to the cause of liberty and justice. A deep sense of patriotism is evident in the career of this man who served his country as a soldier in the Civil War and as a state and national judge for many years. Perhaps a most fitting closing would be to repeat a short passage from a Memorial Day speech Holmes delivered in 1884. What he said that day was indicative of the great sense of love and devotion he had always maintained for his country through three years in the Civil War, two decades on the Massachusetts Supreme Court and three decades on the United States Supreme Court. The words he used in the Memorial Day speech sound much like those of another Massachusetts

man when he was inaugurated as President of the United States. Holmes's words, which are so similar to the never to be forgotten words of John Fitzgerald Kennedy, ring clear as a guide to all Americans. He said:

> ...It is now the moment when by common consent we pause to become conscious of our national life and rejoice in it, to recall what our country has done for each of us, and to ask ourselves what we can do for our country in return.[27]

FOOTNOTES

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